85-889

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term

THE STATE OF COLORADO,
Petitioner,

v.

STEVEN LEE BERTINE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a routine, good faith inventory search of closed containers in an automobile "reasonable" under the Fourth Amendment as interpreted by this Court in Illinois v. Lafayette?

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OPINION BELOW

The opinion of the Colorado Supreme Court is included as Exhibit "A".

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Writ of Certiorari to the Supreme Court of Colorado is here sought to review the judgment and opinion in the People of the State of Colorado, County of Boulder v. Steven Lee Bertine, Exhibit "A", attached, decided September 30, 1985.

On October 1, 1985, the Colorado Supreme Court issued an order of remittitur to the trial court, Exhibit "B", attached. On October 9, 1985, the People of the State of Colorado (hereafter referred to as "The People"), filed a motion to vacate remittitur, attached to this Petition as Exhibit "C". This was done because Colorado Appellate Rule 4.1(g), attached to the

Petition as Exhibit "D", specifically prohibits a petition for rehearing on interlocutory appeals in criminal cases.

On October 16, 1985, the Colorado Supreme Court granted the People's Motion to Vacate Remittitur, which ordered the remittitur withdrawn and which stayed the reissuance of the remittitur until November 15, 1985, to allow for filing of this petition. The order further stated that additional stays after November 15, 1985, must be ordered by the United States Supreme Court. This order is attached to this petition as Exhibit "E".

No cross-petition for writ of certiorari has been filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257, and 1(b) and 1(c) of Rule 17 of the Revised Rules of the Supreme Court of the United States. That rule provides in subsection (b) that a review of a writ of

certiorari may be considered "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." U.S. Sup.Ct. Rule 17(1)(b), 28 U.S.C.A. Subsection (c) of Rule 17 provides that a review of a writ of certiorari may be considered "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." U.S. Sup.Ct. Rule 17 1(c), 28 U.S.C.A. The date of the Colorado Supreme Court's granting the Motion to Vacate Remittitur was October 16, 1985. Pursuant to U.S. Sup.Ct. Rule 20.1, 28 U.S.C.A., "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort . . . shall be deemed in time when it

is filed with the Clerk within sixty (60) days after entry of such judgment."

CONSTITUTIONAL PROVISION INVOLVED IN THE SUBJECT CASE.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const.Amend. IV.

STATEMENT OF THE CASE

Statement of Pertinent Facts

The facts are set forth in the Colorado Supreme Court's opinion, Exhibit "A" to this Petition. In short, the facts established at the suppression hearing were as follows:

> On February 10, 1984, Officer Toporek of the Boulder Police Department followed a 1957 panel truck weaving in traffic and traveling fifty to fifty-five miles per hour in a thirty-mile per hour zone. Upon stopping the vehicle Toporek observed the driver, Respondent in this petition, to have a strong odor of alcohol on his breath, watery and glassy eyes, and slow speech. The Respondent

performed roadside sobriety maneuvers to determine whether he could safely drive his truck. Based upon all of his observations, Toporek arrested the Respondent for driving under the influence of alcohol, placed him in his patrol vehicle, and radioed to Officer Reichenbach to come and impound the truck because it was illegally parked in a lane of travel on a busy Boulder street, thus obstructing traffic.

Reichenbach testified that pursuant to the Boulder Municipal Code and the Boulder Police Department Regulations, automobiles are routinely impounded where they constitute a traffic hazard or for other reasons. Reichenbach arrived at the scene of the arrest at about the time Toporek left to take the Respondent to the Boulder Police Department for booking and a blood alcohol test. After calling animal control to remove a dog from the truck, Reichenbach began an inventory of the truck's contents. He testified that inventories were routinely done to protect the owner from having any valuable items stolen during the period of impoundment, to protect the police department against false claims of loss, and to protect the police and public from dangerous items such as explosives or weapons.

On his inventory form Reichenbach noted jumper cables, a tire, a shovel, and some sandbags. Reichenbach also discovered a brown

backpack on the floor behind the front bench seat. Upon picking it up he could tell that it contained something because of its weight and obvious fullness. Reichenbach testified that in his experience people in university towns (Boulder is the home of the University of Colorado) commonly use backpacks like purses for carrying valuable items such as wallets, checkbooks, cameras, calculators, and text books. He testified that he personally had found things of value, explosives, and weapons in similar backpacks.

Inside the backpack Reichenbach found numerous personal items such as a heavy metal flashlight, a hair brush, and other items. Additionally he found a tan zippered nylon bag containing several hard objects. He opened the nylon bag and observed inside three metal canisters and one small coffee can. Each of the metal canisters was approximately 3 inches by 5 inches and 1-1/2 inches in depth. The canisters had lids which were held in place by metal clips at each end. The coffee can had an ordinary lid. The canisters are the type commonly sold in camping and backpacking stores as all-purpose containers of personal items. Reichenbach opened the canisters and the coffee can to see whether they contained any items of particular value or dangerousness that needed to be seized for safekeeping. Inside of the canisters and can he found cocaine-related paraphernalia,

several grams of cocaine packaged in individual bindles, and seven hundred dollars ($700) cash. Having been a narcotics officer for several years, Reichenbach recognized the items for what they were, seized them, and completed the inventory. He then had the car towed to a private impound lot and brought the backpack and contraband to the police station where he put it into the property and evidence room.

Statement of Pertinent State Court Proceedings

On February 16, 1984, the Respondent was charged with driving under the influence of an intoxicating liquor and possession of cocaine with intent to sell and distribute. After a preliminary hearing the Respondent was arraigned on May 8, 1984 and pled not guilty. The trial court set a motions hearing for July 9 and 10, with trial to begin on July 16, 1984.

Respondent's motion to suppress alleged that the arrest was without probable cause, that the inventory search was a pretext for a general rummaging through the car, and that the search of the closed backpack and

containers exceeded the permissible scope of an inventory search.

On July 9th and 10th, 1984, the trial court heard evidence and ruled that there was probable cause to arrest, that the inventory search was conducted pursuant to standard police procedures and was not a pretext, and that the search of the backpack and its contents was lawful under the Fourth Amendment and Illinois v. Lafayette, 462 U.S. 40 (1983). However, the trial court found that the search of the backpack violated article II, section 7 of the Colorado Constitution (which is substantially identical to the Fourth Amendment) as interpreted by the Colorado Supreme Court in People v. Counterman, 556 P.2d 481 (1976). Thus, the trial court suppressed the search on state law grounds.

The trial setting was vacated and on July 19, 1984, the People filed a notice of interlocutory appeal with the Colorado

Supreme Court pursuant to Colorado Appellate Rule 4.1. In the opening brief the People argued that Illinois v. Lafayette established the lawfulness of inventory searches of closed containers under the fourth amendment, and that nothing in the Colorado Constitution or case law interpreting it required a different result. The Respondent, though represented by the Public Defender, did not file an answer brief.

On September 30, 1985, the majority of the Colorado Supeme Court announced its opinion, Exhibit "A" to this Petition, affirming the trial court's suppression of the inventory search of the backpack and its contents. The state court based its decision squarely and solely on the Fourth Amendment, specifically stating that it did not reach the issue of the Colorado Constitution. The state court distinguished Illinois v. Lafayette on the basis that it

applied only to preincarceration inventory searches, not to automobile inventory searches, because the governmental interest in inventorying closed containers found in vehicles is not as great as the governmental interest in inventorying closed containers brought with an arrested person to the booking desk of the jail. Finally, the Colorado Supreme Court balanced the governmental interests in inventorying the specific items - the three canisters and coffee can - against the Respondent's privacy interests in those items. Using this unprecedented container-by-container balancing test, the state supreme court concluded that the inventory search of the canisters and coffee can was "unreasonable" and affirmed the trial court's suppression of the search, albeit on federal rather than state grounds.

Two of the seven judges dissented, and their opinion presents a forceful exposition of Petitioner's position.

LEGAL ARGUMENT

This petition for a writ of certiorari is requested to resolve the issue of whether the Fourth Amendment requires the suppression of evidence of criminal conduct found during a routine inventory search of closed containers in an automobile.

The Colorado Supreme Court's Decision Conflicts With Applicable Decisions of This Court

The Colorado Supreme Court's ruling on the Fourth Amendment issues in this case is directly contrary to this Court's decisions in Illinois v. Lafayette and South Dakota v. Opperman, 428 U.S. 364 (1976). The state court's attempt to distinguish Illinois v. Lafayette was based on several analytical errors.

The Colorado court distinguished Illinois v. Lafayette from this case

because, in its opinion, the governmental interests in inventory searches of closed containers are greater in preincarceration inventories than in inventories of impounded automobiles. This supposition directly contradicts this Court's previous rulings. In South Dakota v. Opperman, this Court identified three important governmental interests in inventory searches of automobiles: safekeeping of valuable property, protection of the police from false claims of theft, and protection of the police and public from dangerous instrumentalities. The identical governmental interests were cited by this Court in Illinois v. Lafayette as the basis for the "reasonableness" of preincarceration inventory searches. This Court stated:

> A range of governmental interests support an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims

> regarding what was taken from their possession at the stationhouse. * * * Arrested persons have also been known to injure themselves or others with belts, knives, drugs or other items on their person while being detained.

103 S.Ct. at 2609-10. The only additional governmental interest cited in Illinois v. Lafayette was that the inspection of an arrestee's personal property may help the police in determining the identity of the arrested person. Obviously, as in this case, where a person is arrested while driving his vehicle, the search of the vehicle likewise may assist the police in identifying the person arrested.

The first two governmental interests - safekeeping of valuable articles and protection of the police from false claims of theft - are identical in preincarceration inventory searches and automobile inventory searches. The third - protection of the police and public from dangerous

instrumentalities or prevention of dangerous items from being introduced into the jail - is equally compelling in both situations. As this Court stated in Illinois v. Lafayette, "[d]angerous instrumentalities - such as razor blades, bombs, or weapons - can be concealed in innocent looking articles taken from the arrestee's possession." 103 S.Ct. at 2609.

Similarly, many types of closed containers commonly encountered during automobile inventories can conceal dangerous items. Boxes, sacks, tubes, purses, bottles: Anyone of these containers, without giving any definitive external sign of its contents, could contain a loaded gun, spring-knife, razor blade, volatile chemical, or explosive. When doing an inventory and confronted with a closed container, the police officer must chose to either seize it or leave it. It is not reasonable to require the police officer who

must move around inside of the vehicle and pick up closed containers to evaluate them, or the property custodian at the stationhouse, to handle, transport, and store closed containers without some knowledge of the hazards or risks involved.

Certain facts about closed containers are inescapable: by their nature they frequently do not give any external indication of their contents, and the only feasible method of determining whether they contain valuable or dangerous items is to look inside. Thus, whether the inventory search precedes incarceration or impoundment of a vehicle, the only adequate method to fulfill the governmental interests involved is to inventory the contents of closed containers.

This conclusion was stated expressly in Illinois v. Lafayette. This Court stated:

> It is immaterial whether the police actually fear any particular package

> or container; the need to protect against such risks arises independent of a particular officer's subjective concerns. * * * Even if a less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the every day course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit. * * * [A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

103 S.Ct. at 2610-11. Thus, the Colorado Supreme Court's attempt to distinguish automobile inventories from preincarceration inventories is directly contrary to this Court's prior rulings.

The Colorado Supreme Court made a second significant error in interpreting South Dakota v. Opperman to authorize courts to engage in a container-by-container balancing test. In South Dakota v. Opperman this Court utilized a balancing test of the

government's and individual's interests to determine the "reasonableness" of inventory searches generally. This Court did not propose that such an analysis be applied on a container-by-container basis. As this Court noted in Illinois v. Lafayette, the "reasonableness" of inventory searches is not based upon probable cause, but upon the outcome of the balancing test. In other words, the balancing-of-interests test governs the "reasonableness" of inventory searches generally, but does not govern the scope of the search. Thus, the Colorado Supreme Court's application of a container-by-container balancing-of-interests test is not supported by South Dakota v. Opperman.

In its essence, the container-by-container balancing test employed by the Colorado Supreme Court is identical to the "less intrusive means" test unequivocally rejected by this Court in Illinois v.

Lafayette. The Colorado court found the inventory search in this case "unreasonable" because a secure impound facility was available, the Respondent was available to decide whether he wanted his car impounded or not, and the metal canisters and coffee can were intended as repositories of personal affects. No impound lot, no matter how secure, can protect the police from false claims of theft or insure that instrumentalities dangerous to the towing and impound lot personnel or general public are not present. Here the Respondent was arrested for drunken driving. Is the arresting police officer supposed to decide whether the Respondent was too intoxicated, or sober enough, to make an intelligent decision? Is the arresting police officer supposed to drive the Respondent to the nearest telephone, wait while he calls several friends, and then wait longer while a friend drives to the scene of arrest,

knowing all the time that he has an obligation by law to have a blood alcohol test performed on the Respondent within a short time after the arrest? The number of impossible decisions, all of which could effect the "reasonableness" of the policeman's decision to impound and inventory, is limitless. Finally, the fact that a particular closed container is intended as a repository of personal affects is a nonsensical consideration. Such containers are the type most needing inventorying because they are most likely to contain valuable items. In fact, the canisters in this case contained extremely valuable items - cocaine and seven hundred dollars cash. In short, the container-by-container balancing analysis is unprecedented, contrary to this Court's ruling in Illinois v. Lafayette, and totally unworkable.

The Colorado Supreme Court's Decision Conflicts With Other State Courts Of Last Resort And With Federal Court Of Appeals Decisions.

The decision by the Colorado Supreme Court in this case is in direct conflict with several state courts of last resort and more than one federal court of appeals. As such, this writ squarely falls under a prime consideration for review under Rule 17(1)(b) of the Revised Rules of the Supreme Court.

For example, in Hamby v. Commonwealth, 279 S.E.2d 163 (Va. 1981), the Supreme Court of Virginia upheld the warrantless inventory search of an unlocked but zippered-shut briefcase found in the backseat of the defendant's car. In State v. Glenn, 649 S.W.2d 584 (Tenn. 1983), the Supreme Court of Tennessee held that it was lawful to inventory a closed container found in the trunk of a vehicle. The Glenn Court pointed out that there has been "no consensus among the jurisdictions on whether inventorying

the contents of a closed container found in a lawfully impounded vehicle is, in the absence of exigent circumstances, reasonable or unreasonable." 649 S.W.2d at 585. The Glenn Court cited approximately nineteen (19) cases which support the proposition that closed containers can be searched pursuant to an inventory, and approximately thirteen (13) cases, state and federal, to support the proposition that closed containers, as a rule, may not be searched pursuant to an inventory search.

The decision of the court below is in conflict with several federal court of appeals decisions, as well. The Seventh Circuit, in United States v. Griffin, 729 F.2d 475 (1984), cert. denied, 105 S.Ct. 117 (1984), the Eleventh Circuit in United States v. Laing, 708 F.2d 1568, (1983), cert. denied, 104 S.Ct. 246 (1983), and the Second Circuit in United States v. Markland, 635 F.2d 174 (1980), have all

held, under varying circumstances that inventory searches of closed containers are lawful. Other federal appeals courts have held the opposite. For example, the Eight Circuit in United States v. Bloomfield, 594 F.2d 1200 (1979), held as illegal the opening of a zipper-closed knapsack during an inventory search.

The Issue In This Case Is An Important Question Of Federal Law Which Should Be Settled By This Court.

Additionally, under subsection (c) of Rule 17 of the Supreme Court, the issue of whether closed containers may be searched pursuant to an automobile inventory search is an "important question of federal law which has not been, but should be, settled by this Court." From the authorities presented above, it is apparent that courts throughout the land have decided this issue in different ways, using the touchstone of "reasonableness" to reach diverse results. What one court holds as being reasonable

under South Dakota v. Opperman, another court finds unreasonable, yet all the courts claim to be interpreting the same Fourth Amendment. The police of this country need an easily understood rule of what is or is not reasonable during an inventory search when confronted with a closed container.

As this Court can see from the plethora of cases cited, this issue emerges on a regular basis. Every day across the nation thousands of automobiles are impounded, whether because of an arrest or for another reason, and each automobile is inventoried. To leave the law unresolved on an issue that regularly repeats itself is to leave the police in a situation where they must hazard a guess as to whether their actions are lawful under the Fourth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the _____ day of November, 1985, I placed in the United States Mail, postage prepaid and properly sealed and addressed, a copy of the foregoing Petition for Writ of Certiorari to:

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_____
JOHN M. HARIED

EXHIBIT "A"

SUPREME COURT, STATE OF COLORADO
CASE NO. 84SA331 September 30, 1985

THE PEOPLE OF THE STATE OF COLORADO,
COUNTY OF BOULDER,
Plaintiff-Appellant,

v.

STEVEN LEE BERTINE,
Defendant-Appellee.

Interlocutory Appeal, District Court
Boulder County
Honorable Richard C. McLean, Judge

EN BANC ORDER AFFIRMED

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Attorneys for Defendant-Appellee

JUSTICE ERICKSON delivered the Opinion of the Court. JUSTICE ROVIRA dissents and CHIEF JUSTICE QUINN joins in the dissent.

The district attorney filed this interlocutory appeal after the district court granted a defense motion to suppress evidence seized from the defendant's backpack during an automobile inventory search. We affirm.

I.

At approximately 12:50 a.m. on February 10, 1984, Officer Julius Toporek (Toporek) of the Boulder Police Department observed the defendant's older model panel truck traveling at a high rate of speed. Toporek followed the vehicle and saw the defendant change lanes several times without signalling. By following the defendant's vehicle and maintaining a constant distance, Toporek estimated the vehicle's speed at approximately fifty to fifty-five miles per hour. The posted speed limit was thirty

miles per hour. Toporek then turned on his overhead lights and stopped the vehicle.

Toporek approached the vehicle and asked the driver, Steven Lee Bertine (defendant), for his driver's license and registration. The defendant and his dog were the only occupants in the vehicle. In talking to the defendant, Toporek detected a strong odor of an alcoholic beverage on the defendant's breath. He also noticed that the defendant's eyes were watery and glassy, and that the defendant's speech was slurred and somewhat dragged out. Based upon his observations, Toporek believed that the defendant was driving while under the influence of alcohol.

Toporek asked the defendant to perform a series of roadside sobriety tests. The defendant complied with the request and completed the tests. Toporek concluded, based on his observations, that defendant was intoxicated and advised the defendant

that he was under arrest for an alcohol-related offense.

After taking the defendant into custody, Toporek asked Officer Reichenback (Reichenback), who had arrived as a backup officer, to impound the defendant's vehicle. Subsections 7-7-2(a)(1) and 7-7-2(a)(4) of the Boulder Revised Code authorize police officers to impound vehicles when drivers are taken into custody or when a vehicle obstructs traffic or creates a traffic hazard.[1] In the course of impounding the vehicle, Reichenback radioed an animal control unit to remove the defendant's dog. After the dog was removed, Reichenback requested a tow truck.

Before the tow truck arrived, Reichenback made an inventory of the items found in the vehicle in accordance with Boulder police procedure,[2] and listed jumper cables, a tire, a shovel, and some sandbags. Reichenback also discovered a closed

backpack directly behind the front seat and made a detailed inventory of the contents of the backpack. The officer first unzipped the main compartment where he found, among other items, a separate, zippered nylon bag. He then unzipped the nylon bag and found three tin cans and an "Irish Mocha Mint" coffee can, all secured with covers. The officer opened the coffee cans and found the contraband in issue. The property report documenting the contents of the backpack reflects that one of the tin cans contained cocaine paraphernalia, another contained bindles of cocaine, and the third contained $700 in cash, all in twenty-dollar bills. The coffee can contained more bindles of cocaine and a number of tablets in a zip-lock bag. After the inventory was completed, a private tow-truck company towed the defendant's vehicle to its impound lot.

Defendant asserted a number of grounds for suppression of the evidence seized in

the inventory search. He argued that Toporek did not have sufficient grounds to make a stop, that there was no probable cause for his arrest, and that the impoundment and inventory were not conducted in accordance with standard procedure. He also claimed that the inventory was merely a pretext for a warrantless investigatory search. Finally, he asserted that the police officers exceeded the constitutional limits of a proper inventory search by examining the inside of the backpack, when the purposes for the search could have been achieved by less intrusive means, such as sealing the car doors with evidence tape or removing the backpack and listing it as one sealed unit.

Following the suppression hearing, the trial court found that the police had probable cause to make the initial stop, to administer the roadside sobriety tests, and to arrest the defendant. The trial court

also found that the officers followed standard police procedures when they impounded the vehicle and conducted a detailed inventory search of its contents. The trial court rejected defendant's contentions that the police conducted the search in bad faith and that the inventory search was a pretext for an investigatory search.

In reviewing the scope of the search, the trial court relied on Illinois v. Lafayette, 462 U.S. 640 (1983), and concluded that the search was reasonable under the fourth amendment to the United States Constitution. However, because of People v. Counterman, 192 Colo. 152, 556 P.2d 481 (1976), the trial court held that the search violated article II, section 7, of the Colorado Constitution. It is from this ruling that the prosecution appeals.

II.

The fourth amendment safeguards an individual from an unreasonable governmental invasion of his privacy. Because of the important role that a search warrant plays in protecting fourth amendment liberties, the Supreme Court has held that searches conducted without a warrant are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); Chimel v. California, 395 U.S. 752, 759 (1969).

The Supreme Court first recognized the inventory exception to the warrant requirement in South Dakota v. Opperman, 428 U.S. 364 (1976). In Opperman, the police impounded the defendant's unoccupied automobile after two parking tickets were issued charging that the car was parked in a restricted zone. At the impound lot, a

police officer observed a watch on the dashboard and other items of personal property in plain view on the back seat and floorboard. Following routine procedure, the officer inventoried the contents of the automobile and discovered a plastic bag of marijuana in the unlocked glove compartment.

In upholding the search, the Supreme Court established the balancing test weighing the legitimate governmental interests advanced by the search against the invasion of privacy which the search entailed. The Court pointed out that an individual possesses a diminished expectation of privacy in an automobile because of the public nature of automobile travel and because automobiles, unlike homes or offices, are subject to pervasive governmental regulation and inspection. 428 U.S. at 367-68. Balanced against this diminished expectation of privacy, the Court weighed three governmental interests served

by an inventory search: (1) the protection of the owner's property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property; and (3) the protection of the police from potential danger. Id. at 369.

Based on the facts in Opperman, the Court concluded that the warrantless inventory search of the glove compartment did not violate the fourth amendment. The Court specifically emphasized that the defendant was unavailable to make other arrangements for the safekeeping of his belongings, and that the search was prompted by the presence of a number of valuables in plain view inside the vehicle. Id. at 375-76. Cf. South Dakota v. Opperman, 247 N.W.2d 673 (S.D. 1976).

Although Opperman approved of automobile inventories in general, the Court's opinion did not foreclose challenges

regarding the permissible scope of such searches. Opperman did not resolve whether law enforcement officers, in the course of an inventory search, could open and examine luggage and other closed containers, which, unlike a glove compartment, have privacy interests that are not diminished in any way. Four dissenters in Opperman stressed: [T]he Court's opinion does not authorize the inspection of suitcases, boxes or other containers which might themselves be sealed, removed and secured without further intrusion." Id. at 388 n.6 (Marshall, J., dissenting).

Because Opperman did not resolve the container question, courts subsequently looked to Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977), for guidance on the issue. Both decisions hold that the fourth amendment required exclusion of evidence seized by police officers in the warrantless

search of closed containers found in an automobile. In Chadwick, the Court concluded that the warrantless search of a double-padlocked footlocker could not be justified under the automobile exception to the warrant requirement. Distinguishing the case from South Dakota v. Opperman, the Court stated:

> The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view, except as a condition to border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

433 U.S. at 13 (emphasis added).

Similarly, in Arkansas v. Sanders, 442 U.S. at 753, the Court held that the warrantless search of a suitcase seized from the trunk of a taxicab violated the fourth

amendment. In his concurring opinion, Chief Justice Burger stated: "The essence of our holding in Chadwick is that there is a legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person; that expectation of privacy is not diminished simply because the owner's arrest occurs in a public place." Id. at 766-767 (Burger, C.J., concurring).[3]

Several courts have extended the principles enunciated in Chadwick and Sanders to containers opened during the course of a routine inventory search. E.g., United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979) (inventory search of knapsack); cf. United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) (inventory search of briefcase); United States v. Calandrella, 605 F.2d 236 (6th Cir. 1979) (inventory search of briefcase). These cases recognized that an individual possesses a

reasonable expectation of privacy in regard to sealed containers that must be respected during an inventory search.

In People v. Counterman, 192 Colo. 152, 556 P.2d 481 (1976), we held that an inventory search of a closed knapsack found inside an impounded vehicle violated the defendant's rights under the fourth amendment of the United States Constitution and article II, section 7 of the Colorado Constitution. Recognizing what the Supreme Court later made explicit in Chadwick and Sanders, we stated that the defendant "clearly had an expectation of privacy with regard to his sealed knapsack which was sufficient to invoke constitutional protections against unreasonable police intrusion." 192 Colo. at 154, 556 P.2d at 483. Balanced against this strong privacy interest, we found that the government interests served by the search were relatively weak:

> The knapsack did not give any indication that its contents were dangerous or particularly valuable and in need of a special inventory. The legitimate purposes of the inventory search could have been fully accomplished by merely noting the item as a sealed knapsack. The defendant could have been offered the choice of a full inventory of the contents at the police station.

Id. at 158, 556 P.2d at 485.

In the present case, although the district court suppressed the evidence on state constitutional grounds, the court concluded that the inventory search of defendant's backpack did not violate the defendant's rights under the United States Constitution. The court reasoned that Illinois v. Lafayette, 462 U.S. at 640, rejected our fourth amendment analysis in Counterman. We disagree.

III.

In Lafayette, the defendant was arrested in a movie theater for disturbing the peace and taken to the police station for booking. At the stationhouse, a police

officer ordered the defendant to empty his pockets and place the contents on the counter. After doing so, the defendant took a package of cigarettes from his shoulderbag and placed the bag on the counter. The officer then removed the contents of the bag and found several amphetamine tablets inside a cigarette package. Relying on the government's overriding interest in preserving the security of the stationhouse and jail, the Court concluded that it was not unreasonable for the police to search any container or article in the arrested person's possession as a standard preincarceration procedure. 462 U.S. at 648.

In our view, the holding in Lafayette is inapposite to this case. Unlike the present case, Lafayette did not involve an inventory search of an impounded automobile. The sole question in Lafayette concerned whether the police acted reasonably in

searching the defendant's shoulderbag prior to incarceration.

This court has implicitly recognized that the governmental interests served by a preincarceration inventory search are invariably greater than the governmental intererts advanced by the search of an impounded vehicle. Compare People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971) with People v. Counterman, 192 Colo. at 152, 556 P.2d at 481.[4] Unlike an inventory search of an impounded vehicle, a preincarceration search is justified by the need to prevent the introduction of contraband or weapons into the jail facility. As the Court emphasized in Lafayette:

> Arrested persons have also been known to injure themselves--or others--with belts, knives, drugs or other items on their person while being detained. Dangerous instrumentalities--such as razor blades, bombs, or weapons--can be concealed in innocent-looking articles taken from the arrestee's

> possession. The bare recital of these mundane realitites justifies reasonable measures by police to limit these risks. . . .

462 U.S. at 646.

Lafayette is consistent with our decisions holding that the police have wide latitude in conducting searches in a jail setting. See, e.g., People v. Glaubman, 175 Colo. at 41, 485 P.2d at 711 (preincarceration search of pouch held reasonable); Avalos v. People, 179 Colo. 88, 498 P.2d 1141 (1972) (preincarceration search of purse held reasonable). See also United States v. Edwards, 415 U.S. 800 (1974). Because of the compelling need to prevent the introduction of weapons and contraband into a jail facility, we have generally upheld searches of purses and other containers in an arrested person's possession, even though the governmental interests supporting the search might

conceivably have been achieved through less intrusive means.

As our decision in Counterman demonstrates, the same compelling governmental interests that justify broad searches in the jailhouse setting do not necessarily extend to inventory searches of impounded vehicles.[5] Generally, the governmental interests supporting an automobile inventory search are not as great as those supporting a preincarceration search. Therefore, police officers must give greater deference to the individual's expectation of privacy in the contents of his vehicle. See, e.g., People v. Grana, 185 Colo. 126, 527 P.2d 543 (1974) (search of zippered flightbag).

Because of the greater governmental interests served by a preincarceration search, Lafayette's broad language should not be extended to the facts in this case. We do not interpret Lafayette as giving

police unbridled authority to search every container and package found in an automobile during a routine inventory search. Nor do we read Lafayette as stripping courts of all discretion to protect individuals from over-intrusive invasions in the context of an automobile inventory search. The reasonableness of any automobile inventory search must, in our view, still be determined by applying the legal standards set forth in Opperman and Counterman.[6]

Applying those standards to this case, we hold that the inventory search of the backpack did not comply with fourth amendment standards of reasonableness. During the suppression hearing, the tow-truck operator testified that the impound lot was entirely enclosed by a six-foot fence; that the lot was locked and lighted; that no one other than the tow-truck company had access to the lot; that police officers and security officers

routinely patrolled the area; and that to the best of his knowledge nothing had ever been stolen from a vehicle stored at the lot. Secure facilities for the defendant's automobile were thus available. Compare People v. Grana, 185 Colo. at 126, 527 P.2d at 543 (search unreasonable where impound lot was fenced and patrolled by dogs) with South Dakota v. Opperman, 428 U.S. at 366 n.1 (impound lot was an "old county highway yard" with a dilapidated wire fence where police had experienced difficulty with theft).[7]

In addition, the defendant here was available and the necessity or justification for a full inventory search of the automobile and its contents was not established. Compare South Dakota v. Opperman, 428 U.S. at 364, and Cady v. Dombrowski, 413 U.S. 433 (1973) (unavailability of owner significant factor in upholding inventory search) with People

v. Counterman (defendant available). In Cady v. Dombrowski, the defendant was involved in a one-car collision and arrested for driving under the influence of alcohol. At the direction of the police, the defendant's car was towed from the scene of the accident to a private garage. The defendant, an off-duty police officer at the time of the accident, was believed to have been carrying a revolver. The weapon was not found on the defendant's person or in the car at the scene of the accident. The Court upheld the action of the police in returning to the car and searching it without a warrant. The Court stated that since the police reasonably believed that a weapon might be found in the defendant's vehicle and might fall into the hands of vandals if not removed, the search was reasonable. The Court noted that at the time of the search the defendant was in a coma and thus unable to remove the weapon

himself. In the present case, there was no similar exigency to justify the warrantless search of the defendant's backpack, and the defendant was available to make alternative arrangements for its safekeeping.

Most significantly, the search here involved an intrusion into a container intended as a repository of personal effects. Unlike the unlocked glove compartment in Opperman, containers such as backpacks do not carry a diminished expectation of privacy. See Arkansas v. Sanders, 442 U.S. at 753; United States v. Chadwick, 433 U.S. at 1. The defendant here, like the defendant in Counterman, clearly had an expectation of privacy with respect to the sealed knapsack that was sufficient to invoke constitutional protections against unreasonable searches and seizures.

We fail to see any factual exigencies or unique circumstances that would justify a

departure from our holding in Counterman. If anything, the search here constitutes a much more serious invasion of privacy than the search in Counterman. Not only did the officer open and search the closed backpack, he also searched two other sealed containers inside the backpack before discovering the contraband in question. Even assuming that the officer acted reasonably in opening either the backpack or the sealed nylon bag, little justification existed for further intrusion into the sealed cans. We have repeatedly held that an inventory search must be limited to those areas where valuables or weapons may "reasonably" be found. E.g., People v. Rutovic, 193 Colo. 397, 566 P.2d 705 (1977); People v. Grana, 185 Colo. at 126, 527 P.2d at 543.

In this case, the tin cans gave little indication that their contents contained valuables or dangerous instrumentalities. Thus, the governmental interests served by

the search were not substantial. Accord State v. Jewell, 338 So.2d 633 (La. 1976) (inventory search of aspirin bottle held unreasonable since bottle was unlikely place for storage of valuables or weapons). Applying the balancing test established in Opperman, we conclude that the defendant's privacy interests in the cans outweighed the government's need to inventory their contents.

We also reject the prosecution's argument that the search should be upheld since the officer inventoried the backpack pursuant to Boulder Police Department directives. Although a finding that the police followed routine procedure is important in determining whether a search is reasonable, see People v. Meeks, 194 Colo. 214, 570 P.2d 835 (1977), such a finding should not end a court's inquiry. See People v. Hicks, 197 Colo. 168, 171, 590 P.2d 967, 969 (1979).[8] As one court has

observed, "[u]nconstitutional searches cannot be constitutionalized by standardizing them as a part of normal police practice." State v. Jewell, 338 So.2d at 640. Even though routine procedures have been followed, courts should not blind themselves to police practices that sanction an unlimited intrusion into areas where an individual clearly possesses a reasonable expectation of privacy. Simply put, the rights secured by the fourth amendment cannot be eliminated by administrative fiat. See Note, Illinois v. Lafayette: Has the Fourth Amendment Vanished in the Face of Administrative Expediency? 21 Cal. W.L. Rev. 218 (1984).

In conclusion, our decision in Counterman is dispositive of the issues raised in this appeal. We therefore affirm the trial court's order suppressing the evidence. Because we view the search here as violative of fourth amendment

protections, we need not decide whether article II, section 7 of the Colorado Constitution provides citizens of this state with greater protections than the United States Constitution in the area of automobile inventory searches.

The trial court's suppression order is therefore affirmed.

JUSTICE ROVIRA dissents, and CHIEF JUSTICE QUINN joins in the dissent.

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[1] Section 7-7-2(a) provides in pertinent part:

> A peace officer is authorized to remove or cause to be removed a vehicle from any street, parking lot, or driveway when:
>
> (1) A vehicle is situated in a manner that obstructs the normal movement of traffic and the person in possession of the vehicle is not present or is unwilling or unable to provide for its immediate removal; [or]
>
> . . . .
>
> (4) The driver of a vehicle is taken into custody by the police department.
> . . .

Boulder Rev. Code §§ 7-7-2(a)(1), -2(a)(4) (1981).

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[2] Boulder Police Department directives specify:

> A. Upon placing a motor vehicle in Police custody, Officers shall take the following steps in securing the vehicle and its contents:
>
> 1. If the vehicle or its contents have been used in the commission of a crime, or are themselves the

fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.

2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.

3. The Officer shall request a Tow Truck, and upon its arrival have the Tow Truck operator sign the IMPOUND FORM, keeping one copy in his possession, before the Officer releases the vehicle for impoundment in the City of Boulder impoundment facility.

General Procedure issued from the office of the Chief of Police, Boulder Police Department, Boulder, Colorado, concerning Motor Vehicle Impounds, effective September 7, 1977 (emphasis added).

The Boulder Police Department's directives provide officers with a number of alternatives when they arrest a motorist for serious violations of the motor vehicle code. Although the procedure followed in this case was officially authorized, the officer also had the option of either sealing the vehicle before it was towed away, or driving the vehicle to the nearest lot and locking it. The Boulder Police Department's regulations and rules do not require that an automobile be inventoried and searched in accordance with the procedures followed in this case.

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[3] Subsequent to Chadwick and Sanders the Supreme Court announced New York v. Belton, 453 U.S. 454 (1981), Robbins v. California, 453 U.S. 420 (1981), and United States v. Ross, 456 U.S. 798 (1982). In Belton, the Court held that when a police officer has made a lawful custodial arrest of an occupant of an automobile, he may contemporaneously search the passenger compartment of the automobile and any containers found within the passenger compartment. In Robbins, however, the court rejected the contention that the automobile exception to the warrant requirement justifies the warrantless search of closed containers found inside the automobile. The Court held that a container found during a lawful search of an automobile may not be opened without a warrant, unless the contents of the container are in plain view. Only one year after Robbins the Court reversed itself and declared in Ross that under the automobile exception to the warrant requirement, the police may conduct a warrantless search of the entire automobile, including all containers found inside the automobile.

The broad scope of the searches upheld in Belton and Ross was justified by the Court based upon the purposes of those searches. In a search incident to the arrest of an occupant of an automobile, the purpose is to prevent the arrested person from grabbing a weapon or trying to destroy evidence. Therefore, the containers in the passenger compartment may be searched because they are under the control of the arrested person. The purpose behind the automobile exception is to allow contraband to be seized from an automobile before it can be secreted away. This purpose

justifies a search of the entire automobile and any containers found therein.

By contrast, the purposes supporting an inventory search of an automobile do not give the police unlimited authority to search any container found inside the automobile. See supra p.6; infra pp. 9, 12-16.

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[4] In Glaubman, Boulder police arrested the defendant and transported him to police headquarters. There, the police searched a pouch found dangling from the defendant's trousers and discovered marijuana and LSD. We upheld the search "on the grounds that it was an inventory search incident to the Boulder police booking procedure which was designed to prevent Glaubman from causing contraband or weapons to be introduced into the jail and to insure security in the jail." 175 Colo. at 54, 485 P.2d at 718.

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[5] In Counterman, we refused to extend our holding in Glaubman to inventory searches of automobiles.

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[6] Professor LaFave suggests the following five factors to examine after Opperman in determining whether a particular inventory search complies with fourth amendment standards of reasonableness: (1) whether the jurisdiction has secure facilities where impounded vehicles can be adequately safeguarded from vandals and thieves; (2) whether the car owner is available to make alternative arrangements; (3) whether the

vehicle was likely to be impounded for a long period of time; (4) whether the police confined the search to parts of the car customarily used to store valuables; and (5) whether the search involved an intrusion into an area where the owner possessed an expectation of privacy. See 2 W. LaFave Search & Seizure § 7.4 (1978).

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7 We recognize that simply because less intrusive means of safeguarding the defendant's property were available to the police in this case does not render the inventory search unreasonable. As the Court in Illinois v. Lafayette noted: "[T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps . . . ." 462 U.S. at 647 (emphasis in original). Of course, in determining what the fourth amendment requires, we must balance governmental interests against the defendant's privacy interests. We believe that the availability of secure impoundment facilities in this case served to lessen the need of the police to conduct a detailed inventory search of defendant's vehicle.

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8 As we stated in Hicks:

> The existence of a routinely required inventory procedure does not alone validate searches carried out pursuant to that procedure. If a warrantless inventory search were to be permitted "on any arrest when a [p]arty and [v]ehicle are separated," the exception which allows a warrantless inventory of an automobile's contents would soon

eclipse the rule that a search warrant is the sine qua non of a Fourth Amendment search. 197 Colo. at 171, 590 P.2d at 969.

JUSTICE ROVIRA dissenting:

I respectfully dissent.

The majority holds that cocaine seized from the defendant's backpack during the course of a routine inventory search of his automobile incident to his lawful arrest violates the fourth amendment of the United States Constitution. In my opinion, this holding does not conform with recent pronouncements of the United States Supreme Court, beginning with South Dakota v. Opperman, 428 U.S. 364 (1976), and culminating with Illinois v. Lafayette, 462 U.S 640 (1983).

Opperman held, for the first time, that a warrantless search of an automobile's unlocked glove compartment was valid under an inventory exception to the warrant requirement. Less rigorous warrant requirements were permitted in Opperman, in part, because the Court had traditionally

drawn a distinction between automobiles and homes or offices in relation to the fourth amendment. 428 U.S. at 367. In addition to the element of mobility, less rigorous warrant requirements govern an automobile because the expectation of privacy is significantly less than that relating to one's home or office. Opperman, 428 U.S. at 367. See also Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

Opperman, however, left open the question of whether law enforcement officers, in the course of an inventory search, could open and examine closed containers found in vehicles. The scope of such searches was uncertain due to the differing expectations of privacy associated with containers as opposed to automobiles.

The majority now attempts to answer the container question by relying mainly on two cases decided after Opperman: United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas

v. Sanders, 442 U.S. 753 (1979). Slip op. at 7. These cases are cited for the proposition that evidence discovered as a result of searching a backpack in the course of an inventory search of an impounded vehicle should be excluded. Slip op. at 7-8. However, Chadwick and Sanders lend only minimal, if any, support to the majority's position. Neither case involved an inventory search. Rather, both involved warrantless searches of luggage, suspected of containing marijuana, located in the trunks of automobiles.

Chadwick held that the seized marijuana must be excluded because the search was not justified under either the "automobile exception" to the warrant requirement or as a search incident to lawful arrest. In Chadwick, the government did not even attempt to characterize the search as an inventory search. Similarly, Sanders, decided four years before Lafayette,

involved a warrantless search of an unlocked suitcase found in the trunk of a taxicab. The cab was not impounded at the time of the search, but had been stopped shortly after leaving an airport.

Almost five months after Opperman was decided, this court decided People v. Counterman, 192 Colo. 152, 556 P.2d 481 (1976). There, we affirmed a trial court's suppression of cocaine discovered in a closed knapsack during an inventory search of an automobile. We found a greater expectation of privacy in containers and held the search violated both the fourth amendment of the United States Constitution and article II, section 7, of the Colorado Constitution for two reasons. First, its contents were not in plain view nor did the knapsack give any indication that its contents were dangerous or particularly valuable and in need of special inventory. Second, the legitimate purposes of the

search could have been fully accomplished by merely noting the item as a sealed knapsack. 192 Colo. at 157-58, 556 P.2d at 485.

Counterman thus attempted to discern a hierarchy for inventorying containers based on their characteristics. Only those containers which gave an indication that their contents were dangerous or particularly valuable could be inventoried. Since the knapsack in Counterman was found not to have given any indication that its contents were dangerous or valuable, the scope of the inventory search was found to be constitutionally unreasonable. 192 Colo. at 158, 556 P.2d at 485.

The second basis for the court's holding in Counterman was that the existence of less intrusive alternatives is of greater significance in the context of container searches than automobile searches. We found it significant in Counterman that "the legitimate purposes of the inventory search

could have been fully accomplished by merely noting the item as a sealed knapsack" or "[t]he defendant could have been offered the choice of a full inventory of the contents at the police station." 192 Colo. at 158, 556 P.2d at 485.

Contrary to the opinion of the majority, I am convinced that the United States Supreme Court's recent decision in Illinois v. Lafayette, 462 U.S. 640 (1983), now rejects the two bases of the holding in Counterman and therefore compels an opposite result in this case. Under Lafayette, it is plain that neither the characteristics of the container nor the existence of less intrusive alternatives plays a material role in determining the constitutionality of inventory searches of containers.

In Lafayette, a unanimous Court held that it was not "unreasonable" under the fourth amendment for police, as part of routine police procedure incident to

incarcerating an arrested person, to search in accordance with established inventory procedures any container or article in his possession. 462 U.S. at 648. See also Avalos v. People, 179 Colo. 88, 498 P.2d 1141 (1972) (search of purse); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971) (search of pouch).

The Lafayette Court refused an opportunity to distinguish Opperman on the basis that there is a greater expectation of privacy in a purse-type shoulder bag than in an automobile, and that the legitimate governmental interests supporting an inventory search could have been met in a less intrusive manner by sealing the shoulder bag within a plastic bag or box and placing it in a secured locker. The Court did note the greater expectation of privacy in containers, but reaffirmed its position in Chadwick that probable cause to search is irrelevant in inventory searches, and that

the salutary functions of a warrant simply have no application in the context of such searches. 462 U.S. at 643-44 (quoting United States v. Chadwick, 433 U.S. 1, 10 n.5 (1977)).

Rejecting the argument that the shoulder bag could have been secured in a less intrusive manner, the Court stated:

> [T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps; it is not our function to write a manual on administering routine, neutral procedures of the stationhouse. Our role is to assure against violations of the Constitution.

Lafayette, 462 U.S. at 647 (emphasis in original). The Court further explained why the existence of a less intrusive alternative, one factor relied upon in Counterman, did not compel a different result:

> We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees

> and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.
>
> Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit.

462 U.S. at 648.

In opting for a single familiar standard for inventory searches of containers, the Court continued on the course charted in New York v. Belton, 453 U.S. 454 (1981), and United States v. Ross, 456 U.S. 798 (1982), that a constitutional distrinction cannot be made between containers on the basis of differing characteristics in the context of fourth amendment analysis. As Justice Stevens stated in Ross:

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.
>
> . . . A constitutional distinction between 'worthy' and 'unworthy' containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction.

456 U.S. at 821-22 (footnotes omitted). Therefore, the attempt in Counterman to distinguish between containers on the basis of their characteristics, whether they give an indication that their contents are "dangerous or particularly valuable," like the existence of less intrusive alternatives, was displaced by Lafayette for the purpose of inventory searches.

New York v. Belton is also germane to this case because it signaled the Court's willingness, in certain instances, to elevate legitimate law enforcement concerns over the individual's expectation of privacy in containers located within an automobile. Belton involved a search of the pockets of a coat found inside a vehicle which had been stopped for traveling at an excessive rate of speed. The Court held that a policeman who has made a lawful custodial arrest of an occupant of an automobile may contemporaneously search the passenger compartment of that automobile and containers located therein. 453 U.S. at 460.

The Belton Court, while recognizing the privacy interest one has in such containers, nevertheless opted to subordinate that interest to the overriding governmental interest of providing for the safety of police officers conducting lawful custodial

arrests. The Court stated: "Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." Id. at 461.

The competing interests present in Belton are similar to those in this case. On one hand is the admittedly strong privacy interest one has in a backpack containing personal belongings, on the other, the strong governmental interest in protecting the property of the arrestee, protecting police officers from false claims, and protecting persons from dangerous instrumentalities and illicit substances. In this case, after balancing the competing interests as the Court did in Belton, I find that the Opperman factors, when combined

with the compelling need for a comprehensible and workable rule governing inventory searches, tip the scale in favor of the governmental interests.

Therefore, I believe the trial court in the instant case correctly concluded that Lafayette is not limited to inventory searches at the stationhouse incident to preincarceration of an arrestee, but also extends to inventory searches of automobiles. The same governmental interests of protecting the defendant's property, the police against false claims, and the police and the public against the potential danger or hazards posed by the impounded property are at work in both the stationhouse and the automobile, foreclosing any principled distinction between preincarceration inventory searches and inventory searches of automobiles.[1]

The majority nevertheless asserts that "this court has implicitly recognized that

the governmental interests served by a preincarceration inventory search are invariably greater than the governmental interests advanced by the search of an impounded vehicle." Slip op. at 11. In an attempt to apply the third Opperman factor, the majority reasons that there is a more compelling need to search for weapons in the stationhouse than there is when searching an impounded vehicle. Although this reasoning is sound when searching the actual person of an arrestee, it makes absolutely no sense when applied to searches of containers within the detainee's possession. The police can just as easily note seal, and store a backpack found on the person of an arrestee as it can a knapsack found in the back seat of an automobile. In both cases, once the container is removed from the reach of the arrestee, the threat of weapons or contraband being introduced to the jailhouse no longer exists. In both instances,

sealing and storing the container is a viable means of avoiding a search of the container. Yet, Lafayette declined to impose on law enforcement agencies such a duty to seal and store.

The remaining two prongs of Opperman also apply no more convincingly in the context of a stationhouse search of an arrestee than in the context of an inventory search of an automobile. In regard to the goal of protecting the owner's property while it remains in police custody,[2] there is no convincing distinction which would support a search of a container in the precustodial stationhouse situation while not in the impounded vehicle situation. Equally strained is the argument that the goal of protecting the police against false claims is somehow served by a full search of containers in the stationhouse but not those in an impounded automobile.

In sum, I believe that the compelling governmental interests that justify broad searches in the stationhouse do indeed extend to inventory searches of impounded vehicles. Cf. slip op. at 12. The governmental interests served by a complete preincarceration stationhouse search are no greater than those served by a complete inventory search of an impounded vehicle. In light of Lafayette, Counterman should be overruled.

The majority opinion also fails to recognize that several courts have concluded that the principles enunciated in Lafayette are not limited to containers in the possession of arrestees at the stationhouse but apply with equal force to containers found in inventoried vehicles. United States v. Griffin, 729 F.2d 475 (7th Cir.) (wrapped package in car), cert. denied, 105 S.Ct. 117 (1984); People v. Braasch, 122 Ill. App. 3d 747, 461 N.E.2d

651 (1984) (paper bag in trunk whether open or closed); State v. Bronaugh, 16 Ohio App. 3d 237, 475 N.E.2d 171 (1984) (brown paper bag and suitcase in trunk). In fact, the only authorities cited by the majority which appear to be directly on point are cases which were decided prior to Lafayette. Slip op. at 9.

Since Lafayette rejected the notion that a container carried by an arrestee should be sealed rather than searched, one commentator predicts it is "[d]oubtless the Court would reach precisely the same conclusion as to containers within inventoried vehicles." 2 W. LaFave, Search and Seizure § 7.4 at 262 (1984 Supp.) (footnote omitted). Accordingly, I agree with the trial court that the inventory search, conducted pursuant to standard procedure, of the backpack located in the automobile was not unreasonable under the fourth amendment.

While the trial court correctly realized that Lafayette has displaced our fourth amendment analysis in Counterman, and that the search did not violate the defendant's rights guaranteed by the United States Constitution, I believe it erred in finding that Lafayette did not overrule this court's "interpretation" of article II, section 7, of the Colorado Constitution set forth in Counterman. On that basis alone, the trial court suppressed the contents of the backpack. Contrary to the trial court's analysis, Counterman did not purport to establish adequate and independent state constitutional grounds to justify the suppression of the contents of the container inventoried there. Rather, article II, section 7, of the Colorado Constitution was simply cited and interpreted coextensively with the fourth amendment. Because the fourth amendment was found to have been violated, article II, section 7, was

necessarily found to have been violated as well. In short, nothing in Counterman suggested that state and federal constitutional analysis should diverge in the context of inventory searches. The mere citation to article II, section 7, cannot be summarily interpreted as a departure from federal law in the area of an inventory search and seizure.

I would accordingly reverse the order of the district court suppressing the cocaine and remand the case for further proceedings.

I am authorized to say that CHIEF JUSTICE QUINN joins in this dissent.

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[1] In some instances, the governmental interests supporting inventory searches may weigh more heavily to justify an automobile search than a search at the stationhouse. For example, a dangerous instrumentality located in an automobile may pose a greater threat to the public than it would if it were in police custody. See Cady v. Dombrowski, 413 U.S. 433 (1973) (revolver removed from trunk for safety of general public).

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[2] The majority assigns particular importance to the fact that the police searched not only the backpack but also the sealed tin cans within the backpack. The court reasons that once the backpack was searched, there was "little justification . . . for further intrusion into the sealed cans" because "an inventory search must be limited to those areas where valuables or weapons may 'reasonably' be found." Slip op. at 15, citing People v. Rutovic, 193 Colo. 397, 566 P.2d 705 (1977); People v. Grana, 185 Colo. 126, 527 P.2d 543. I think it may fairly be contended that it is not unusual for persons to keep valuables in their backpacks. Additionally, it was not unreasonable to think that the cans contained within the knapsack could have contained jewels or currency. Indeed, the third tin can contained $700 in cash. Slip op. at 4.

EXHIBIT "B"

SUPREME COURT, STATE OF COLORADO

Case No. 84SA331

INTERLOCUTORY APPEAL, DISTRICT COURT, BOULDER COUNTY; 84CR0158-4

NOTICE

THE PEOPLE OF THE STATE OF COLORADO,

COUNTY OF BOULDER,

Plaintiff-Appellant,

v.

STEVEN LEE BERTINE,

Defendant-Appellee.

Please be advised that the Remittitur in the above entitled action and matter was issued on October 1, 1985.

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Boulder, Colorado 80302

EXHIBIT "C"

SUPREME COURT, STATE OF COLORADO

Case No. 84SA331

MOTION TO VACATE REMITTITUR

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

STEVEN J. BERTINE,

Defendant-Appellee.

COME NOW the People of the State of Colorado, by and through Alexander M. Hunter, District Attorney in and for the Twentieth Judicial District, County of Boulder, State of Colorado, and move to vacate the remittitur ordered in this case on October 1, 1985 and received on October 2, 1985.

As grounds for this motion the People allege that:

1. C.A.R. 4.1(g) prohibits a petition for rehearing on interlocutory appeals in criminal case.

2. The opinion of the Supreme Court of Colorado, issued September 30, 1985, is, therefore, a final judgment.

3. The People of the State of Colorado intend to seek review of that final judgment by filing a Petition For Writ Of Certiorari in the Supreme Court of the United States.

4. This matter should not, therefore, be remitted to the trial court until completion of review by the Supreme Court of the United States.

WHEREFORE, the People ask this Court to vacate its order of remittitur in this matter issued on October 1, 1985.

Respectfully submitted,

ALEXANDER M. HUNTER
DISTRICT ATTORNEY

By: _____

JOHN M. HARIED, Reg. #10514
Deputy District Attorney
Post Office Box 471
Boulder, Colorado 80306
(303) 441-3700

By: _____

RICHARD F. GOOD, Reg. #10501
Deputy District Attorney

CERTIFICATE OF MAILING

I hereby certify that I have mailed in the United States Mail, postage prepaid, a true and correct copy of the foregoing Motion To Vacate Remittitur this 9th day of October, 1985, to the following:

Cary Lacklen, Esquire
Deputy State Public Defender
Suite 201B
207 Canyon Boulevard
Boulder, Colorado 80302

_____
Alice F. Young

EXHIBIT "D"

COLORADO APPELLATE RULES 4.1
INTERLOCUTORY APPEALS
IN CRIMINAL CASES

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

EXHIBIT "E"

SUPREME COURT, STATE OF COLORADO
Case No. 84 SA 331
INTERLOCUTORY APPEAL FROM THE DISTRICT COURT, BOULDER COUNTY, NO. 84CR0158-4

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,
COUNTY OF BOULDER,
Plaintiff-Appellant,

vs.

STEVEN LEE BERTINE,
Defendant-Appellee.

Upon consideration of the Motion to Vacate Remittitur filed by counsel for Plaintiff-Appellant herein,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Granted, and the Remittitur issued by this court on October 1, 1985 is hereby withdrawn.

It Is Further Ordered that re-issuance of said Remittitur is Stayed up to and including November 15, 1985 to allow for filing of Petition for Certiorari to the United States Supreme Court. Any additional

stays are to be obtained from the United States Supreme Court.

It Is Further Ordered that the remittitur will re-issue from this court unless a copy of any additional stay ordered by the United States Supreme Court is received on or before November 15, 1985.

BY THE COURT, OCTOBER 16, 1985

cc: John M. Haried
Deputy District Attorney
P.O. Box 471
Boulder, CO 80306

Cary Lacklen
Deputy State Public Defender
Suite 201B
207 Canyon Boulevard
Boulder, CO 80302

Hon. Richard McLean, Judge
P.O. Box 471
1777 - 6th Street
Boulder, CO 80306

Clerk of the District Court
2025 - 14th Street
Boulder, CO 80302

ORIGINAL

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-889

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE STATE OF COLORADO

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Steven Lee Bertine, Respondent herein, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court, and to file herein his Brief in Opposition to the Petition for Writ of Certiorari previously filed by the State of Colorado. The Brief in Opposition to the Petition for Writ of Certiorari is presented herewith for filing.

The Affidavit of Respondent in support of this motion is filed herewith.

Dated: February 28, 1986

Respectfully submitted,

DAVID F. VELA
Colorado State Public Defender

Thomas M. Van Cleave III

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

COUNSEL FOR RESPONDENT
1362 Lincoln Street
Denver, Colorado 80203
(303) 866-2661

No. 85-889

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

THE STATE OF COLORADO, Petitioner

v.

STEVEN LEE BERTINE, Respondent

I, Steven Lee Bertine, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am presently on bond and living in Boulder County, Colorado; and I am not employed.

2. I have but a mininal amount of cash and no checking or savings account.

3. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

4. I have been adjudicated as indigent throughout the proceedings in the State of Colorado and have been represented by the Colorado State Public Defender at all stages of these proceedings.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Steven L Bertine
STEVEN LEE BERTINE

Subscribed and sworn to before me this 17th day of December, 198__.

My Commission Expires: My Commission Expires Sept 9, 1988

Notary Public

United Bank of Boulder
P.O. Box 299
Boulder, Colo. 80306

CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Steven Lee Bertine, Respondent herein, certify that on February 28, 1986, I served one copy of the attached Motion to Proceed in Forma Pauperis, and Affidavit in support thereof, on the Honorable Alexander M. Hunter, District Attorney for the Twentieth Judicial District, State of Colorado, counsel for Petitioner, by depositing same in the United States Mails, postage prepaid, addressed as follows:

Alexander M. Hunter
District Attorney of Boulder County
P. O. Box 471
1777 Sixth Street
Boulder, Colorado 80306

Thomas M Van Cleave III

No. 85-889

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID F. VELA
Colorado State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

COUNSEL FOR RESPONDENT
1362 Lincoln Street
Denver, Colorado 80203
(303) 866-2661

QUESTION PRESENTED FOR REVIEW

Should certiorari be granted to review the decision of the Colorado Supreme Court which upheld the trial court's suppression of evidence obtained as the result of a search by police of closed containers in the Respondent's vehicle conducted in the process of impounding the vehicle after arresting him on a traffic charge?

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No. 85-889

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

Respondent generally accepts the factual statement in the Petition for Writ of Certiorari, but reserves the right to make corrections or additions where necessary or appropriate.

ARGUMENT

THE DECISION OF THE COLORADO SUPREME COURT UPHOLDING THE TRIAL COURT'S SUPPRESSION OF EVIDENCE WAS SUBSTANTIALLY CORRECT, AND THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI WOULD BE INAPPROPRIATE IN THIS CASE.

A. Inapplicability of South Dakota v. Opperman and Illinois v. Lafayette.

In South Dakota v. Opperman, 428 U.S. 364 (1976), this Court held that an inventory search of an automobile impounded for municipal ordinance violations was reasonable under the Fourth Amendment. The reasonableness of the search was determined by balancing the car owner's right to privacy against the governmental interests of protecting the car owner's property while in police custody, protection of the police against claims or disputes over lost or stolen property and protection of the police from potentially dangerous instrumentalities in the car. In determining that the governmental interests prevailed over the privacy interests, the Court initially noted that an automobile's inherent mobility and the fact that it is primarily used for public travel cause the owner's expectation of privacy in it to be diminished. Since the owner of the car was not present to make other arrangements for the safekeeping of his valuables, which were visible from outside the car, his privacy interests in the car were outweighed by the governmental interest of protecting his property, and the inventory search was reasonable.

The present case is factually distinguishable from Opperman because the factors in support of the governmental interests which render an inventory search reasonable are not present here. Unlike Opperman, the Respondent was present at the time his vehicle was impounded and was thus available to make arrangements for its safekeeping. The offense for which he was arrested, driving under the influence of alcohol, was one which, in all likelihood, would not entail a lengthy

jail stay; in fact, he was released on bond the afternoon following his arrest. And, finally, the impound lot was secured by a six-foot high fence with a locked gate to which only the tow-truck driver had access and was frequently patrolled. (Compare the impound facility in Opperman: An old county highway yard fenced partially with a wooden fence and the rest with a dilapidated wire fence. Id., 428 U.S. at 3095 n. 1.) In short, the facts in the present case fail to establish the necessity for conducting an inventory search that was present in Opperman. See also, Cady v. Dombrowski, 413 U.S. 433 (1973) (inventory search upheld where owner of car was unavailable, police had reason to believe that a gun was left in the car, and the car was towed to an unsecured lot with no guard posted over it).

The governmental interest of protecting the police from false claims and dangerous instrumentalities would not have been furthered by the inventory search of the Respondent's vehicle. There is no indication that there would be any less likelihood of a claim for missing property if the vehicle was not searched prior to impoundment, and any danger to police could have been eliminated by not searching the vehicle. Opperman, 428 U.S. at 379 (Powell, J., concurring). Thus, there was an insufficient basis under Opperman to justify an inventory search of Respondent's vehicle.

In addition to the absence of factual support for any governmental interests in searching Respondent's car for inventory purposes, the fact that the search exceeded the scope of an inventory search also rendered it illegal. Officer Reichenbach, in searching the Respondent's vehicle, not only inventoried the items in plain view, he also searched a closed backpack, a closed nylon bag inside the backpack and closed tin cans inside the nylon bag. The State contends that the case of Illinois v. Lafayette, 462 U.S. 640 (1983), extends the scope of an automobile inventory search to closed containers. However, the unique facts of that case do not support an extension of its holding to an automobile search.

Lafayette involved the search of the contents of a shoulder bag belonging to an arrestee as he was being booked into jail. Utilizing the same governmental interests set forth in Opperman, this Court determined that they outweighed the privacy interests of the arrestee and thus the search of the shoulder bag was reasonable. In such a situation the distinct possibility of the introduction of contraband or dangerous instrumentalities into a jail facility satisfies the governmental interest of protecting the police from the danger posed by such items, and creates a substantial if not compelling necessity to search personal belongings of persons booked into the jail. At the same time, incarceration divests a person of all but the most personal privacy rights. Thus, the overwhelming imbalance of the governmental interests over the privacy interests in personal property in a preincarceration inventory search as presented in Lafayette is vastly different from the comparable interests involved in an automobile inventory search.

B. Requirement of Prior Determination of Probable Cause.

In Opperman this Court held that in determining the validity of an inventory search of an automobile, the general reasonableness requirement of the Fourth Amendment is applicable to automobile inventory searches without reference to the warrant or probable cause requirements. Opperman, 428 U.S. at 369-70. Since such searches are "conducted in accordance with established police department rules of policy" the protection of the warrant requirements are deemed unnecessary. Opperman, 428 U.S. at 383 (Powell, J., concurring).

While Opperman approved automobile inventory searches in general, it did not authorize the inspection of the contents of closed or sealed containers in the course of such searches. Id., 428 U.S. at 388 n. 6 (Marshall, J., dissenting). In dealing with searches of closed containers located in automobiles, the more traditional warrant and or probable cause requirements have been applied. Thus, in

United States v. Chadwick 433 U.S. 1 (1977), the Court, noting that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile" held that a warrant was required to search a footlocker contained in an automobile. Id., 433 U.S. at 13. See also, Arkansas v. Sanders, 442 U.S. 753 (1979) (warrantless search of luggage found in trunk of taxi in which defendant was riding at time of his arrest was improper).

Even where exceptions to the warrant requirement have allowed warrantless searches of closed containers found in automobiles, a preliminary showing of probable cause has still been required. New York v. Belton, 453 U.S. 454 (1981) (search incident to a lawful custodial arrest of the occupant of an automobile may extend to the contents of any containers found within the passenger compartment of the car); United States v. Ross, 456 U.S. 798 (1982) (probable cause to search an automobile allows search of any containers found therein). The recent cases of this Court involving searches of containers in automobiles thus indicate that containers found in an automobile may be searched only upon a prior determination of probable cause, either as to the container itself or as to the automobile within which it is located; and unless a recognized exception to the warrant requirement exists, either for searching the container or the car, a warrant must be obtained to search the container.

Thus, while a reasonable automobile inventory search pursuant to established procedures is permissible, the search of any closed containers found therein must be based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant.

C. Overbroad Discretion Allowed by Inventory Search Procedures.

As noted above, only the general reasonableness standard, and not the probable cause or warrant requirements, are applicable in determining the validity of an inventory search of an automobile. Under Opperman this lesser standard is

justified because the policies served by the requirements of the Warrant Clause of the Fourth Amendment are effectuated by the inherent limitations governing an inventory search:

> Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. Thus, there are no special facts for a neutral magistate to evaluate.

Opperman, 428 U.S. at 383 (Powell, J., concurring). However, in the present case, the inventory search procedures under which the inventory search of Respondent's car was conducted provided no real limit to the officer's discretion in determining whether to impound the vehicle as well as the extent of the inventory search of it.

In Procedure No. 77-GP-0-19 (See Appendix A), w[illegible] was admitted into evidence at the suppression hearing, and which was in effect at the time of the inventory search of Respondent's vehicle, the procedures for automobile inventory searches provided for situations where a vehicle or its contents have been used in the commission of a crime differ from those where the vehicle has not been so used. Where the vehicle has been used in the commission of a crime, the officer is required to conduct a detailed vehicle inspection and inventory and remove personal items of value and place them in "Property" for safekeeping. The officer is then required to request a tow truck for transportation of the vehicle to the impoundment facility. On the other hand, where the vehicle and its contents are not used in the commission of a crime the officer may invoke "Park and Lock Procedures," in which the vehicle may be parked and locked instead of impounded. In this situation the officer again conducts a detailed vehicle inspection and inventory. However, Procedure III.B.2. provides that "[c]losed containers that give no indication of containing either valuables or a weapon may not be opened and the contents searched. (i.e., inventoried)." And Procedure III.B.4. requires the officer to drive the vehicle off the roadway and park it in the nearest public parking area.

At the suppression hearing Officer Reichenbach testified that since the Respondent was arrested for a traffic offense he considered the vehicle to have been used in the commission of a crime. However, Reichman admitted that he did not always impound vehicles involved in traffic offenses and that a driving-under-the-influence violation was no different from any other custodial traffic arrest. He further testified that whether a vehicle was impounded under Part II of the Procedure or just "Parked and Locked" under Part III was in the discretion of the individual officer at the scene.

Under the police department procedures for impounding and or searching vehicles involved in a custodial traffic violation situation, the applicable inventory procedures in this case thus allow the officer at the scene wide latitude in determining when and how the arrestee's vehicle is to be inventoried. The officer is initially given discretion whether the vehicle is to be handled under Part II or Part III of the inventory procedures. In the situation of a traffic offense, the officer may or may not, in his discretion, treat the vehicle as having been used in the commission of a crime. If he does treat the vehicle as having been used in the commission of a crime, he is required to conduct an inventory search and have the vehicle towed to the impound lot. If he does not so treat the vehicle, he has additional options. He may still have the vehicle impounded, in which case he may conduct a full inventory search of the vehicle. Or he may utilize the "Park and Lock" procedures under which he is required to drive the vehicle to the nearest public parking area (which, in this case, was less than a block away) and is precluded from searching any closed containers that give no indication of containing valuables or weapons (which in this case they did not). In view of the wide discretion allowed officers in the determination of when and how a vehicle whose driver has been arrested for a traffic offense may be impounded and searched, the inventory procedures pursuant to which Respondents car was searched

fail to sufficiently limit the discretion of the officer in conducting an inventory search so as to provide an adequate substitute for the traditional probable cause and warrant requirements. Accordingly, the validity of the inventory search of Respondent's vehicle must be determined under the principles established for those requirements.

CONCLUSION

Under the unique facts of this case, it cannot be said that the decision of the Colorado Supreme Court invalidating the search of closed containers during the inventory search of Respondent's vehicle presents such a substantial conflict with decisional law of this Court as to warrant the granting of the State's Petition for Writ of Certiorari.

DAVID F. VELA
Colorado State Public Defender

Thomas M. Van Cleave III

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

COUNSEL FOR RESPONDENT
1362 Lincoln Street
Denver, Colorado 80203
866-2661

CERTIFICATE OF MAILING

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Steven Lee Bertine, Respondent herein, certify that on February 28, 1986, I deposited in the United States Mails, postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis.

Thomas M Van Cleave III

THOMAS M. VAN CLEAVE, III

CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Steven Lee Bertine, Respondent herein, certify that on February 28, 1986, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable Alexander M. Hunter, District Attorney for the Twentieth Judicial District, State of Colorado, counsel for Petitioner, by depositing same in the United States Mails, postage prepaid, addressed as follows:

The Honorable Alexander M. Hunter
District Attorney of Boulder County
P. O. Box 471
1777 Sixth Street
Boulder, Colorado 80306

Thomas M Van Cleave III

APPENDIX A

BOULDER POLICE DEPARTMENT - BOULDER, COLORADO
OFFICE OF THE CHIEF OF POLICE
GENERAL PROCEDURE

DATE ISSUED 7/19/77 PROCEDURE NO. 77-GP-O-19

DATE EFFECTIVE 9/01/77 EXPIRATION Indefinite

CANCELLED PROCEDURE None

SUBJECT OF PROCEDURE MOTOR VEHICLE IMPOUNDS

TO: All Department Personnel

I. Purpose

To insure the appropriate care and security of motor vehicles taken into custody by the Department.

II. Procedures

A. Upon placing a motor vehicle in Police custody, Officers shall take the following steps in securing the vehicle and its contents:

1. If the vehicle or its contents have been used in the commission of a crime, or are themselves the fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.

2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.

3. The Officer shall request a Tow Truck, and upon its arrival have the Tow Truck operator sign the IMPOUND FORM, keeping one copy in his possession, before the Officer releases the vehicle for impoundment in the City of Boulder impoundment facility.

B. The above procedure shall be followed when a vehicle involved in a traffic accident is to be held for evidentiary purposes.

III. Park and Lock Procedures

A. Upon placing the operator of a motor vehicle in custody, Officers may take the following steps in securing the arrestee's vehicle and property IF THE FOLLOWING CONDITIONS ARE PRESENT:

1. The vehicle and/or its contents ARE NOT themselves the fruit of a crime, nor has the vehicle or its contents been used in the commission of a crime.

2. The vehicle has not been involved in a traffic accident requiring its impoundment as evidence.

3. Vehicles should only be parked and locked with approval of the arrestee.

B. If the above conditions exist, the Officer may take the following steps to secure the vehicle:

1. Conduct a detailed vehicle inspection and inventory and record it upon a VEHICLE IMPOUND FORM. When possible, have a second Officer witness this inventory.

2. Closed containers that give no indication of containing either valuables or a weapon may not be opened and the contents searched. (i.e., inventoried)

3. Personal items of value will be removed from the vehicle and subsequently placed into PROPERTY for safekeeping.

4. The Officer shall drive the vehicle off the roadway and legally park the vehicle in the nearest PUBLIC parking area. The date, time, and location where the vehicle is parked shall be indicated on the IMPOUND FORM.

5. The Officer shall remove the ignition keys, and lock all doors of the vehicle.

6. During the booking process, the arrestee shall be given a continuation form for his signature which indicates the location of his vehicle. One copy of the continuation form is to be retained in the case file.

7. The arrestee shall be advised of the procedures required in obtaining personal property removed from the vehicle and placed into Property for safekeeping, i.e., TV's, valuables, etc.

8. The ignition key to the vehicle should remain with the items that are transported with the arrestee should this individual be incarcerated.

NOTE: Routine Motor Vehicle Impoundment Procedures should be used if no public parking areas exist in the immediate vicinity of the arrest, or there is reasonable risk of damage or vandalism to the vehicle, or the arrested individual requests that the vehicle be impounded in the City's storage facility.

C. If the aforementioned conditions exist the officer may, at his discretion, release the vehicle to a present individual designated by the arrestee after ownership is shown to be held by this individual, and the person so indicated shows proof of holding a valid motor vehicle operators license.

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-889

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE STATE OF COLORADO,
Petitioner,

v.

STEVEN LEE BERTINE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

JOINT APPENDIX

ALEXANDER M. HUNTER
District Attorney
Twentieth Judicial
District

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Assistant
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COUNSEL FOR RESPONDENT

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1985
CERTIORARI GRANTED MARCH 24, 1986

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NOTE:

The Opinion of the Colorado Supreme Court appealed here appears as Exhibit A to the Petition for Writ of Certiorari and is not reproduced here.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO

DATE	PROCEEDINGS
02-16-84	Complaint filed
03-12-84	Preliminary hearing held and defendant bound over to the district court
05-08-84	Defendant arraigned in the district court, not guilty plea entered, and motions and trial dates set
07-10-84	Hearing on defendant's motion to suppress search of defendant's backpack and order granting that motion
07-19-84	Notice of Interlocutory Appeal filed
	COLORADO SUPREME COURT
09-30-85	Decision reported by Colorado Supreme Court
10-01-85	Remittitur to trial court
10-16-85	Remittitur vacated upon the People's motion
	UNITED STATES SUPREME COURT
11-22-85	Petition for Writ of Certiorari filed
03-24-86	Petition for Writ of Certiorari granted

PEOPLE OF THE STATE OF COLORADO
V.
STEVEN LEE BERTINE
DISTRICT COURT, COUNTY OF BOULDER,
STATE OF COLORADO

I. Defendant's Motion To Suppress:

Defendant, being a person aggrieved by an unlawful arrest, search and seizure, moves to suppress for use as evidence all items obtained by said arrest, search and seizure and all other evidence obtained as a result thereof on the following grounds:

1. On February 10, 1984, the Defendant was arrested and his van was searched by officers of the Boulder Police Department.

2. The Defendant's warrantless arrest was made without probable cause.

3. The search was conducted without a search warrant and without probable

cause to search for evidence or contraband.

4. The police have alleged that the search was justified by the inventory search exception to the legal requirements for a search warrant.

5. During the search the police seized and searched a closed backpack and other closed containers found therein. The contents of the closed containers found in the Defendant's van are the controlled substances alleged in the charges herein.

6. The search of Defendant's van was not pursuant to a valid inventory search.

7. The search of the closed backpack and other containers exceeded the

scope of a valid inventory search. See People v. Counterman, 556 P.2d 481 (1976).

8. For the above reasons and otherwise, the search and seizure was in violation of C.R.S. 16-3-101 et seq.; Rule 41 of the Colorado Rules of Criminal Procedure; Article II, Section 7 of the Colorado Constitution; and the Fourth and Fourteenth Amendments of the United States Constitution.

II. Excerpts from Reporter's Transcript of Suppression Hearing In The District Court, Boulder County On July 9 and 10, 1984.

Testimony of Officer Toporek

DIRECT EXAMINATION BY MR. HARIED

[p.3, l.16 - p.15, l.23]:

MR. HARIED: All right, I would call Officer Toporek.

JULIUS TOPOREK,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARIED:

Q Would you state your name, please.

A Julius Toporek

Q Spell your last name for the court reporter, please.

A T-o-p-o-r-e-k.

Q How are you employed?

A I am a police officer for the City of Boulder.

Q In February of 1984 were you employed in that capacity?

A Yes, sir, I was.

Q I want to direct your attention to February 10, 1984, the early morning hours of that day. At that time, did you arrest the defendant in this case, Steven Bertine?

A Yes, sir, I did.

Q Do you see that person in the courtroom?

A Yes, sir, I do.

Q Can you identify him for the judge, please.

A He is the gentleman with the long red hair, beard, glasses, sitting at the defense table.

MR. HARIED: I would ask the record to reflect the identification of the defendant.

THE COURT: It does.

Q (BY MR. HARIED) Where did that arrest occur?

A It occurred on Broadway just a little north of Baseline, City of Boulder, County of Boulder, State of Colorado.

Q Where did you first -- where were you when your attention was first called to Mr. Bertine?

A I was at the intersection of College and Broadway in Boulder.

Q That's right across from the University, on the hill?

A Yes, sir, it is.

Q What drew your attention to him?

A At that time I was stopped or at a red signal at that intersection. I observed the defendant's vehicle traveling southbound down Broadway at a high rate of speed.

Q How could you tell it was at a high rate of speed?

A It was going a lot faster than the rest of the traffic on Broadway at that time.

Q Can you say 5 miles an hour faster? 15?

A I would estimate anywhere from, say, 10 to 15 miles per hour faster.

At that time I be began to follow the Defendant's vehicle at which time I noticed him to change lanes without signaling, going in and out of traffic.

Q Where were you stopped and which way were you headed?

A Broadway as it comes along around the hill, makes like a T intersection. He is traveling southbound and I proceeded southbound following him towards Baseline Road.

THE COURT: You were on College stopped for the light?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (BY MR. HARIED) At that intersection, as I recall, that's a right turn only for southbound Broadway?

A That's correct. So as I followed him I observed him make several lane changes in and out of traffic and continuing to travel at a high rate of speed.

Q How many lane changes?

A I would say at least two to three that I can be for sure of.

Q Did he signal for any of those?

A No.

Q Okay.

A And then during the time it took my vehicle to catch up, my speedometer averaged between 50 and 55 miles per hour. My vehicle was somewhat paced with his. At which time I then accelerated, turned the emergency equipment on and made contact with him.

* * *

Q What is the speed limit on that section of Broadway?

A 30 miles an hour.

Q You started to say you turned on your overhead lights and pulled this car over. Can you describe what happened at that time?

A At that time I contacted the driver of the vehicle.

Q Okay. How far north of Baseline Road were you when Mr. Bertine's car stopped and you pulled up on him?

A I would say probably 100 yards or within 100 yards.

Q Okay. Can you describe the southbound roadway at that point? How many lanes is it? Is there parking there? Are there public parking lots off of that area?

A At that stretch of the road, I believe it's just two lanes going southbound at which point when it gets closer to the intersection, you then have a right-hand turn lane, and had two left-hand turn lanes. Where we are stopped there was, I believe, two lanes southbound and there was no parking lane area in that stretch of the road.

Q Is that a side road or a main traveled highway at that point?

A It's a main traveled highway, it's 93.

Q What happened when you contacted the driver?

A When I contacted the driver I asked him for his driver's license and registration.

Q Who was driving?

A The defendant, Steven Bertine.

Q Was there anyone else in the car?

A Not human.

Q There was another -- there was an animal?

A There was a dog, yes.

Q Can you describe your contact with Mr. Bertine when you asked him for his driver's license? And tell us what things you saw and did after that point.

A As far as a contact, it was pretty much routine. Upon talking with Mr. Bertine, I did notice that there was a strong odor of alcoholic beverage upon his breath. Upon further observation I realized that his eyes were somewhat watery or glassy.

Q Let me stop you right there. This was about what time of the day?

A It was about ten minutes after midnight.

* * *

Q What else did you observe about Mr. Bertine at that time?

A Upon having conversation with him, I realized that his speech was somewhat slower than I would say a normal person would talk.

Q Can you characterize that? I mean, was it dragged out, or was it just in the continuum of fast and slow it was just slow?

A I would say slow and somewhat dragged out.

Q Anything else you noticed about Mr. Bertine at that time?

A No, sir, not at that time, as I recall.

Q Did you be begin to form any kind of opinion about his condition at that time

based upon your observations and conversations with him?

A Yes, I did.

Q What was that?

A Given in my impression the careless driving, the high rate of speed through the busy intersection of college and Broadway, his going in and out of traffic, his speed, strong odor of an alcoholic beverage, I believed at that time that he was under the influence of an alcoholic beverage.

Q What did you do after you had gotten his driver's license from him?

A After I had obtained the information, I then noticed our communication center that I believed I had a possible DUI, drunk driver, intoxicated driver. And at that time they sent me a back up vehicle.

Q What happened at that time?

A I then requested the defendant to step from his vehicle and asked him to

perform a roadside test, if he would be willing to do so.

* * *

Q What were the maneuvers you asked him to do?

A The four maneuvers that I had him do was first to recite the alphabet, A through Z. I had him then do the finger to nose. The third was the heel to toe walking. And the fourth was the Romberg test.

Q Have you ever conducted these maneuvers with other people on the street before?

A Yes, sir, I have.

Q Approximately how many times?

A I would say at least 50 times.

A Have you had any training in evaluation of these kind of maneuvers -- to educate yourself, judgment about whether a person was affected by alcohol or not affected?

A Yes, sir, I have.

* * *

Q Based on all of the observations you made up to that point about Mr. Bertine and his behavior and mannerisms, did you reach any kind of conclusion about his condition?

A Yes, sir, I did.

Q What was that?

A That he was intoxicated.

Q In your opinion, when you say intoxicated, does that mean that he was not capable of safely driving a car?

A That is correct.

Q What happened after that point?

A After the last maneuver was completed, I had the defendant face Officer Reichenbach, at which time I had him place his hands behind his back, advised him that I was arresting him for an alcoholic related offense and transported him down to the Boulder County Jail.

Q Officer Reichenbach was there at that time. Do you know at what point in this procedure he arrived?

A I believe he arrived right after I had done the first maneuver, reciting the alphabet.

Q Did you have any discussion with Officer Reichenbach. There was another officer there. Shiffano?

A That's correct.

Q Did you have any discussion with either of them about impounding the vehicle, not impounding it?

A Yes.

Q What was that?

A Upon taking the defendant into custody, I asked Officer Reichenbach if he would go ahead and impound the defendant's vehicle for me.

Q What was the reason that the vehicle was impounded? Reason or reasons?

A There was several, you know. One is that pursuant to Boulder revised statutes

that when a driver is arrested from his vehicle, it's authorized that the vehicle can be impounded.

Q When you say Boulder, you mean Boulder Municipal Code?

Q Yes, sir. Boulder Municipal Code 772. Also where the vehicle was parked, was not legal, and for a traffic hazard at that place, the car it was also secured.

Q Not legal because that's a traveled portion?

A Right. There is no parking there on Broadway.

Q At that time, I take it Mr. Bertine was put into your patrol car?

A That is correct.

Q And you drove him to the Justice Center?

A Yes, sir.

* * *

TESTIMONY OF OFFICER REICHENBACH

DIRECT EXAMINATION BY MR. HARIED

[p.17, l.6 - p.32, l.20]:

MR. HARIED: Call Officer Reichenbach.

PAUL REICHENBACH,

called as a witness by and on behalf of the People herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARIED:

Q Can you state your name, please.

A It's Paul Reichenbach. R-e-i-c-h-e-n-b-a-c-h.

Q What's your employment?

A Police officer with the City of Boulder.

Q Were you a police officer in February of 1984?

A Yes.

Q Were you present at the time of the arrest of the defendant in this case, Steven Bertine, on February 10, 1984, as described by Officer Toporek?

A Yes, I was.

Q You were, as I understand it, a back-up officer at that time?

A That's correct.

Q What did you do after -- do you recall the conversation with Officer Toporek about impounding the car?

A I don't specifically remember him asking me to impound it, no.

Q At some point a decision was made to impound it?

A Yes.

Q What did you do? What were the first things you did do?

A The first thing I did, I called animal control because there was a dog inside of it.

Q Can you describe the vehicle? It hasn't been described yet?

A It was an old, I believe a Suburban, something like that, a large vehicle.

Q Okay. The inside passenger compartment area, are there seats? What's inside of it?

A Inside of the truck is a one seat. It's a bench seat in the front that runs from the driver's door to the passenger door. Behind that is open space, no seats behind the first seat.

Q How long did it take for animal control people to come?

A They got there pretty quick. Five to ten minutes I would say after I called them.

Q Is that -- if you find -- if you are going to impound a vehicle that has an animal, is it common to do that?

A Yes.

Q So they can take the dog?

A Yes.

Q How -- five or ten minutes went by. They showed up. They opened the car, took the dog out. Okay, what did you do after that point?

A Requested a tow truck and went into the vehicle to inventory the property inside of it.

Q Let's talk a minute about the purposes of an inventory of a vehicle that's about to be impounded. What is the reason that you do an inventory under those circumstances?

A Well, the vehicle was not legally parked, so I was going to impound it.

The reason we do inventories is to protect the defendant, the person that's been arrested from having any valuables stolen from within the vehicle, to insure that whoever takes the vehicle doesn't take anything that is inside of it.

Q Do you mean the tow truck?

A Yeah, the tow truck company or any of the employees.

Q What other reason in your department do you conduct inventories when a car is impounded?

A Just to look for personal items of value.

Q You said the protection of the owner was one thing?

A Right. Protection of the police department, so that the person doesn't come back and claim that there was something of value taken from within the vehicle. Try to sue the department or the officer.

Q Is there a third reason?

A I would say to protect the -- or to insure that the tow company doesn't go in or somebody go in and take something.

* * *

Q (BY MR. HARIED) You said one reason is to protect the owner of the car from having valuable items taken from his car. Another reason is to protect the police officer and the towing company from being sued by the owner of the car if he later claims something was in there and is now missing.

Is there any other reason that you have been instructed as a reason or you yourself deem to be a proper reason for conducting an inventory of a car that's going to be impounded?

A For any dangerous items such as explosives, weapons.

Q Have you ever found such items in a car before?

A Yes.

Q Were these the purposes for which you are going to do the inventory of this car in this car?

A You bet.

Q How did you initiate -- what was the first thing you did in doing the inventory once the dog had been removed?

A Just first just look through the truck real quickly to see.

Q Look at the outside or the inside?

A Look at the inside, rather. Just gave it a real quick once over. Looked in

the front, looked down the seat, looked in the back.

Q You used a flashlight for that?

A I had one with me. By this time, we had our spot light in the back window and it wac pretty well lit.

Q Okay. Were you inside the car when you did this?

A Either just standing outside the door or up on the front seat.

Q Okay. What did you see you took note of inside the car?

A There was some jumper cables, a tire, a shovel, a brown backpack, a three-quarters full can of beer. That was about it. There wasn't whole lot inside.

Q Okay. I want to hand you what I have marked as People's Exhibit A. Is that the vehicle impound record you did for this car?

A Yes, it is.

Q Okay.

A It's a copy of one.

Q On there you've noted items found in the vehicle. Is that right?

A Yep.

Q And the condition of the external portion of the vehicle?

A Yes.

MR. HARIED: I would move the admission of People's Exhibit A.

MR. LACKLEN: No objection.

THE COURT: Be received.

(People's Exhibit No. A was admitted into evidence.)

Q (BY MR. HARIED) Where did you find this brown backpack that you mentioned?

A It was directly behind the front bench seat right about in the middle of the vehicle.

Q What did you do -- what was the first thing you did with the brown backpack?

A Picked it up.

Q Was it empty, lying flat, full? Did it appear to have items in it? What did you observe about it?

A It appeared to have items inside of it.

Q Can you tell whether they were heavy items, light items like envelopes, couple scraps of paper or something?

A It seemed to be something more significant than paper.

Q How long have you been a police officer in the City of Boulder?

A Three and a half years now.

Q Okay. How much of that time have you worked as a patrol officer?

A About almost two years.

Q Okay. during that time have you come into -- have you arrested people, come into contact with people where you have had cause to search a backpack before in this town?

A Where I have looked through backpacks, yes.

Q Can you describe, based on your experience and training, how people in this community use backpacks, whether they are simply used to carry say climbing gear or whether they are used for more more general purposes?

A The average person on the street in the city carries items of personal value in the backpacks, wallets, checkbooks, text books. It's a whole variety of personal items.

Q Cameras?

A Cameras, cosmetics.

Q Calculators?

A Sure.

Q A lot of students in this town?

A Yes.

Q What did you do with the brown backpack once you found it?

A Picked it up and opened up the top zipper portion of it.

MR. HARIED: I'd like this to be marked as People's Exhibit B, please. I can mark it, actually.

Q (BY MR. HARIED) I hand you what I have just marked as People's Exhibit B. Can you identify that please.

A This is the backpack that was directly behind the bench seat in Mr. Bertine's vehicle.

Q Contains some of the items now that were originally found in it?

A Yes.

Q But it doesn't contain everything that was originally found in it?

A No, it does not.

Q As I understand a couple of the items are in the police laboratory right now being fingerprinted?

A Correct.

* * *

Q (BY MR. HARIED) Okay, Mr.. Reichenbach, I'm going to hand you, again,

what was marked as People's Exhibit B and I'm going to mark these as C and D.

I am handing you People's Exhibit C. Can you identify that, please.

A It's one of the tin cans that I found inside the backpack.

Q Okay. People's Exhibit D, etcetera?

A That's another one of the cans that I found inside the backpack.

Q Can you look inside Exhibit B, can you look see if it contains except for Exhibit C and D, if the backpack contains all of the items that were in it when you first opened it?

A (Complied.) I believe so.

Q For everyone's benefit, I'm going to mark some of these additionally. I will mark this small tan and brown bag as People's Exhibit E. The record should indicate that that was just pulled from Exhibit B by Officer Reichenbach.

I will mark as Exhibit F, a tin can of Irish Mocha Mint Coffee beverage. Similarly just pulled from the backpack.

As People's Exhibit G, a plastic bag containing a third tin can just pulled from the backpack by Officer Reichenbach.

MR. LACKLEN: I'm sorry, what was E?

MR. HARIED: It was this tan and brown zippered nylon bag.

It is -- I will mark as D, the flashlight. And as I, the brush, with H and I, the previous exhibits having just been pulled from the backpack.

MR. HARIED: Your Honor, I move the admission of Exhibits B through I.

MR. LACKLEN: No objection.

THE COURT: They will be received.

(People's Exhibits B through I were admitted into evidence.)

Q (BY MR. HARIED) At the time you first picked up and felt the backpack, all of these items were inside of it?

A Yes.

Q Items C through I?

A (Pause.)

Q Oh, I'm sorry, I didn't mark one. There is another plastic bag that was just pulled from the backpack. I will mark that as J. It's a plastic bag containing white paper stapled shut. Do you know what's inside the white paper, Exhibit J?

A I believe it's contact lens stuff, personal items, nail clippers, things like that.

Q Were those taken from the backpack?

A As far as I can remember they were taken from this front pouch of the backpack.

Q Just so the record is clear, the backpack has two compartments. One a main compartment, and two small pouches on the outside with a zipper.

An that's what Officer Reichenbach has just pointed to. I would also move the admission of Exhibit J.

MR. LACKLEN: No objection. What was I?

THE COURT: I is the brush. Exhibit J is received.

(People's Exhibit No. J was admitted into evidence.)

MR. LACKLEN: Okay.

Q (BY MR. HARIED) So as I understand it, C through I were in the main compartment and those items in J were in the outside compartment?

A Yes.

Q What did you do after you had picked the backpack up and felt there were some items inside?

A Opened the main zippered compartment.

Q Why did you do that?

A Look for personal items of value, explosives, weapons, things like that.

Q And what was it that lead you to believe that such items might be inside the backpack?

A I found items like that before in the past in backpacks.

Q What did you see when you opened the top of the main compartment?

A I saw the brush, the flashlight and Exhibit E, which was closed.

Q It was closed?

A Yes.

Q Okay. What did you do after you looked inside?

A I pulled this out and opened it up.

MR. LACKLEN: I would ask the record to reflect that he is referring to Exhibit E, the tan brown zippered nylon bag?

A Yes, Exhibit E.

THE COURT: Exhibit E, yes.

Q (BY MR. HARIED) Was the zipper fully zipped closed when you first found it?

A As I remember, yes.

Q What did you do then?

A I opened the zipper on Exhibit E.

Q What was the reason for doing that?

A Again, to look for weapons, explosives. Items of value.

Q What did you see when you looked inside Exhibit E?

A I saw People's Exhibit G, C and D on top of one another, and People's Exhibit F.

Q Okay. Those are the three tin cans?

A Three silver tin cans and the Irish Mocha Mint can.

Q What did you do once you saw those items?

A Opened the silver can that was on top.

Q Of those three, do you remember which one was on top without looking at them?

A I'd need to look at the property report.

Q Okay. When you found the one on top, was it -- so the record is clear, these are tin cans that have a bottom can portion and a lid with two clips on each end to seal the lid to the can.

When you found those, were the clips up and the cans closed?

A The tops were on the cans and the clips were closed securing the cans.

Q So you opened the top?

A Yes.

Q What did you see at that time?

A Cocaine paraphernalia.

Q Can you be more specific?

A I believe there was a little glass tube in it that's used for -- it appeared to be smoking cocaine. I can't specifically remember what else was in it. Possibly a razor blade, items like that.

Q You said cocaine paraphernalia. Do you have any background experience in dealing with those kinds of items that you would classify as cocaine paraphernalia?

A Yes, I worked undercover in the Boulder Police Department drug unit for 15 months. I attended a class given by the United States Drug Enforcement Administration, initiation of cases, the

whole gamut of undercover work including identification of controlled substances, field tests, identifying paraphernalia. Just the whole gamut of drug work.

Q What did you do after you discovered these items in the first can?

A I believe I sealed that can and looked through the rest of the tin can.

Q Seal it, you mean you closed it?

A Closed it.

Q You didn't put tape on it?

A No, I just put tape on it --

Q What was in the other cans?

A Had a bunch of folded paper bindles. Each labeled either one-quarter or one-eighth.

Q What is bindles [sic]?

A A bindle is a folded piece of paper which is just had -- generally used to contain controlled substances. Package and carry controlled substances.

Q The numbers one-eighth, one-quarter, do they mean anything to you based on your training and what you observed?

A Yes, they mean the approximate weight of the controlled substance inside. Meaning a quarter gram or whatever else it's labeled.

A I think I might have misspoke. I can't remember if they were labeled one-quarter and one-half or one-quarter and one-eighth. It was either/or.

Q Did you open up any of the bindles to see if anything was inside of them?

A At the scene, I believe I opened one of them, and it appeared to be cocaine.

Q Okay. What did you do with the items that have been admitted, B through J, after that time?

A Put them all back in the backpack, and took them into corrections.

Q Okay.

Q What was done with the vehicle after you completed your inventory?

A It was towed by, I believe, Buff's Conoco.

Q At the time that you started the inventory, taking the dog out, and then going through the car yourself, did you have any reason to believe that Mr. Bertine had committed any crime other than the driving under the influence that he was arrested for? Anything that caught your attention? Any reason you saw that you might suspect that there were drugs in the car?

A No, not until I opened the first can.

Q How long did it take you to complete your inventory once the dog had been removed?

A I would guess from the time the dog was taken out, until the tow truck took the car, it was 20 or 25 minutes. I'm sorry, from the time I requested the animal control officer to come, until the car was towed was 20 or 25 minutes.

Q You are not saying you were going through the car for that period of time?

A No.

Q The actual search that you performed took how long?

A Ten minutes.

Q I'm going to hand you what has been marked as People's Exhibit K. Before I do that, do you know if your department has any written policies governing impounds of vehicles?

A Yes, it does.

Q I'm going to hand you Exhibit K and ask you if you can identify that, please.

A It's a copy of general procedure number 77-GP, as George, Paul,-0-19 entitled Motor Vehicle Impounds, the Boulder Police Department.

Q As part of your training have you been instructed in that policy and the general policies of your department concerning impounds?

A Yes.

MR. HARIED: I would move the admission of Exhibit K.

MR. LACKLEN: No objection.

THE COURT: It will be received.

(People's Exhibit K was admitted into evidence.)

MR. HARIED: I don't have any other questions of this witness.

* * *

CROSS-EXAMINATION BY MR. LACKLEN [p.35, l.9 - p.75, l.14]:

Q You have told us that one of the exhibits has been marked now People's Exhibit J is the things that you found in the front pouch?

A Correct.

MR. LACKLEN: I'd like the record to reflect that I am opening the sealed white envelope.

Q (BY MR. LACKLEN) Officer, I wonder if you could relate for the record what's

just been removed from the white envelope marked as People's Exhibit J?

A A master lock, a plastic bottle containing a small amount of fluid, bottle of Sinus Shower, one-half ounce -- one-half fluid ounce, some sort of white -- it's a Binaca breath spray, a can opener, knife, cork screw, a pen, nail clippers, a hair band, a key, colibry filters -- or flints, rather. And a Cobra -- something to do with a telephone.

Q Okay. If you could just put those back in the white envelope and back into the bag for People's Exhibit J.

Officer, there was something else in the front pocket of the large backpack that wasn't listed on your property report and isn't in People's Exhibit J or the white sealed envelope inside People's Exhibit J. That was an envelope -- a sealed envelope marked rent. Do you remember that?

A Yes, I do.

Q Where did you find that envelope?

A I believe that was also in the front pouch.

Q Where is that in your reports?

A It's in the narrative section, I believe.

Q Perhaps I can assist you. Page 2, last paragraph.

A Yes, the last paragraph of page 2 in my narrative.

Q That's the only place in your report that you indicate that there was $210 found in a sealed, white envelope labeled rent. Is that correct?

A Yes.

Q Why did you open that envelope?

A It felt like money.

* * *

Q So that really wasn't the reason why you were opening the envelope. You were opening the envelope because you had previously found drugs in other portions

of the backpack and you were looking to see if this had something to do with the controlled substances you had found?

A I believe you mistook my answer. The reason I opened the envelope was to protect Mr. Bertine and the police department and myself. As I had said before, it felt like cash to me, dollar bills, and I needed or wanted to count how much was there.

Q Because you felt that by counting the cash and opening a sealed envelope you were protecting yourself and Mr. Bertine more than if you left the envelope sealed?

A Yes.

Q Is that true also with the tin cans?

A At that time I was looking for personal items of value, trying to protect Mr. Bertine, yes.

* * *

Q Mr. Bertine's truck was parked near a fire station at the corner of Baseline and Broadway?

A Yes.

Q Heading south; is that correct?

A Correct.

Q And across the street to the south from that intersection is an office building with a parking lot, is there not?

A Yes, on the southwest corner.

Q And on the south -- on the northeast corner is a park; is that correct? Part of the University?

With the big sculpture.

A It's a little traffic island, yeah, or a triangle.

Q And beyond the traffic island it's part of the University grounds?

A Yes.

Q And on the south east corner of that same intersection is the Basemar Park Shopping Center, which has hundreds and hundreds of parking spaces; isn't that correct?

A Yes.

* * *

Q If this had been a passenger car, would you have checked in the trunk?

A No.

Q No. You wouldn't have opened a locked trunk?

A No.

Q Why is that?

MR. HARIED: Objection. Not relevant.

MR. LACKLEN: I think it's relevant, You Honor.

THE COURT: Overruled.

Q (BY MR. LACKLEN) Officer, if you were searching a vehicle -- if Mr. Bertine had been driving a regular sedan with a normal trunk that wasn't accessible from the passenger compartment, why wouldn't you have searched that?

A Why would I not have searched that?

Q Inventoried the things in the trunk.

A Those items were not in his control when he was stopped. There would have

been no possibility that he could have used a weapon or whatever from that location.

Q Well, I'm talking about an inventory of a car that's being impounded. Would you have searched the trunk?

A No.

Q So are we just talking about the things that are in the defendant's immediate control?

A In the passenger compartment.

Q How are you protected against false claims or theft if you don't search the trunk?

A I have never searched trunks without search warrants. And I can say that with no doubt in my mind. So, whatever was in the trunk, would have been taken, if somebody puts a claim to it, after the vehicle left my custody.

* * *

Q You never discussed with Mr. Bertine what he wanted done with his car at all, did you?

A No.

* * *

Q What was Mr. Bertine's demeanor at the time of your observation of him?

* * *

A Cooperative.

Q He wasn't threatening or abusive to you or Officer Toporek?

A Not at all.

Q You didn't particularly think that he looked dangerous or that you suspected any weapons or any dangerous instrumentalities in the car from his demeanor or any observations before you began inventory?

A I couldn't say what I expected just by looking at him.

* * *

Q Officer, you talked about your experience in searching backpacks in Boulder county: is that correct?

A (Witness indicated.)

Q How many backpacks do you think you have searched?

A 30 to 50, I would guess.

Q How many of those backpacks have contained explosives?

A If you would consider fireworks explosives, maybe 5 or 10.

Q How many of them have contained controlled substances or dangerous drugs?

A Quite a few more than that. 20, 25.

Q A large percentage of the backpacks that you have searched have contained controlled substances, isn't that true?

A Around 50 percent, I would guess.

* * *

So when you began the search with the backpack, there was nothing really suspicious about the backpack, was there?

A Not at all.

Q And you know that Mr. Bertine's wallet wasn't in the backpack because it was on the front seat?

A Right.

* * *

MR. LACKLEN: I show you what has been marked as defendant's Exhibit No. P for identification and ask if you can identify that?

A It's a package of evidence tape which I picked up this morning.

Q You brought that to court at our request?

A Yes.

Q Is that the same type that is on the backpack at this time?

A Basically, yes.

Q Officer Reichenbach, would it have been possible with the evidence tape marked as People's Exhibit P or in some other way to have sealed the backpack in its closed condition when you first picked it up without opening any zippers.

* * *

A Are you asking if I could have sealed it without looking in it and then given it back to him?

Q Yes.

A Yes, I could have done it that way.

Q Okay. And in that way, you would be assured that nothing that was in t' backpack the moment you touched it for the first time had left it until it got back to Mr. Bertine; is that right?

A Right.

Q There was no indication as you picked up that backpack that it contained anything particularly valuable, did it?

A Nothing that made me suspect that whatever was inside of it was of any significant value or not of any value.

Q It wasn't particularly heavy, such as a camera or some other --

A I would say it's as heavy as a camera.

Q You never asked Mr. Bertine whether he wanted his car inventoried or not, did you?

A No.

Q You never asked Mr. Bertine whether he wanted his car moved to a public parking lot and moved and locked and left for him to retrieve later did you?

A No.

* * *

Q (BY MR. LACKLEN) Officer, you didn't ask Mr. Bertine if he wanted his car moved to a public parking lot out of the flow of traffic, did you?

A No.

Q Even though one was available catty-cornered to this?

A Yes. There was one on the south side of Baseline.

Q You didn't ask him if he wanted his car moved and locked with the contents as they were?

A No, I didn't.

* * *

Q You don't impound every car in which you make a custodial arrest, do you?

A No.

Q Sometimes you leave the cars on the street?

A If it's legally parked and the consent of the person that's been arrested.

* * *

Q Do you impound every car in which you make a DUI or a driving while ability impaired arrest?

A No.

Q In your opinion, at the time that Mr. Bertine's car was impounded, why was it being impounded?

A It was in traffic. It was on a roadway, not legally parked. There was nobody at the scene that could have taken it, that he could have given consent to

have drive away. And I was not going to move it into a public parking lot.

Q Okay. Did you ask Mr. Bertine if there was someone that could come pick up the car that you could wait there until a friend arrived to move the car?

A No.

Q It's not unheard of for an officer to drive a vehicle from one place to another after a custodial arrest, is it?

A It has been done.

Q Okay. And this automobile was turned over to a private towing company, Conoco, Buff's Towing?

A I believe so.

Q And they took it to their private lot, right?

A I have no idea what happened to it after it left.

Q So you have no idea what kind of protection Buff's Towing provides once they have custody of the vehicle, do you?

A No, I believe according to the City contract that the City has they have to have a secured, locked area.

Q It's part of your inventory after you had seized and searched the backpack you inventoried the rest of the vehicle; is that correct?

A Yes.

Q And that's reflected in People's Exhibit A which lists jumper cables, blanket, sand bag, tire and shovel?

A Any major item other than personal papers and things like that.

* * *

Q After you had opened the backpack to look for dangerous instrumentalities and valuable personal property, you saw three -- you saw a zippered pouch; is that right?

A Yeah.

Q You opened the top for us?

A Yes.

Q This has been marked as People's Exhibit E. This pouch could have been sealed with evidence tape or in some other manner, so that when it was released to Mr. Bertine you could be assured that it hadn't been opened and nothing had been removed; isn't that correct?

A Yes, I could have done it that way.

* * *

Q So there wasn't anything about these containers -- any of these four containers after you had gone through two sets of zippers to indicate that these containers contained anything particularly valuable or anything particularly dangerous?

A I couldn't say one way or the other.

* * *

Q Another alternative to inventorying Mr. Bertine's car would have been to use evidence tape such as we have a sample of in Defendant's Exhibit P to seal all of the doors of the car so that you could be assured that once the car was released

from you that if those seals remained unbroken, that nothing would have been removed from the car; isn't that correct?

A I would have never done that, no.

Q I am asking you if that was possible, Officer?

A I guess somebody could have done it that way, yes.

Q Isn't it a fact that when cars are seized as evidence in a criminal case that sometimes the doors are sealed with that kind of tape to make sure the cars aren't tampered with?

A Yes.

Q Why are the doors sealed with that kind of tape?

A In criminal cases?

Q In a criminal case.

A Just as you said to make sure nobody goes inside of it prior to obtaining search warrants.

Q You didn't feel before Mr. Bertine was removed from the scene that your safety was threatened by him, did you?

A No.

Q And you didn't have any reason to believe that his van contained any explosives, contraband or evidence of a crime, did you?

A Not before I looked in it.

Q Does the Boulder Police Department use different procedures in a driving under the influence custodial arrest than other custodial arrests?

A No, it depends on where the car is located.

Q So if Mr. Bertine had pulled his car into the Basemar Shopping Center, what would you have done with the car?

A Locked it and left it there if he had agreed to that.

* * *

Q People's Exhibit K, the regulations.

Officer Reichenbach, I will refer you to People's Exhibit K and ask you if you recognize that document?

A Yes, it's the same document that I had earlier, the Boulder Police Department Motor Vehicle Impound Procedure.

Q When you seized the backpack and searched it, was your intention to leave the backpack in the car?

A If there had been nothing of contraband or value in it or explosives or anything.

Q So let's eliminate the -- let's eliminate the money and the contraband and deal with the things that were left.

What would have been left in the backpack besides that?

Would you have left the backpack in the van or taken it somewhere else?

A The only items other than money and contraband were personal items, the flashlight, the hair brush, the items that were in the front.

Had -- if those things were the only things in the backpack, I'm sure I would have left the backpack in the truck.

Q And put it on the impound sheet as one backpack containing personal items?

A Right.

Q I want to refer you to subsection two of those procedures. I will tender the copy to the Court just so the Court can follow along.

Subsection 2, what are the Boulder Police Department procedures regarding personal items?

A If it's an item of personal value, it's to be removed and placed into property.

Q Okay. And under subsection 3, there's what is called park and lock procedures; is that correct?

A Yes.

Q And Mr. Bertine's car qualified under all of the requirements of Subsection A, did it not, for park and lock procedure.

A I would say that under III(A)(1) that sentence where it says the vehicle and or it's contents are not themselves the fruit of a crime, nor has a vehicle or it's contents been used in the commission of a crime -- I would say the vehicle was used in the commission of a crime.

Q Well, that's true in any traffic offense, isn't it?

A Yes.

Q So in any traffic offense you don't always impound the car, do you?

A No.

Q So what I am asking you is, there is nothing different about a DUI arrest than there is about any other kind of traffic custodial arrest, is there?

A No.

Q So what I am asking you is, Mr. Bertine's car, even though it was used in the "commission" of a crime, that's not really what the phrase of that subsection means, is it? Otherwise, you would have

to impound every car that was involved in any traffic offense; isn't that right?

A It says under III(A), upon placing the operator of a motor vehicle in custody an officer may take the following steps in securing the arrestee's vehicle and property if the following conditions are present.

Q So what we get down to is the individual officers discretion on the scene, isn't that right?

A Yes.

Q Under subsection B of park and lock procedures, again, if the above conditions which you said that Mr. Bertine's car qualified for, the officer may take the following steps to secure the vehicle; is that correct?

A That's what it says.

Q What does III(B) say?

A Personal items.

THE COURT: I can read it. Let's not go over that.

Q (BY MR. LACKLEN) Officer, that's part of the impoundment regulations, is it not?

A Yes.

Q It says closed containers that give no indication of containing either valuables or a weapon may not be opened and the contents searched?

A That's under (2). I think you said three before.

Q And that's a regulation that was in effect on February 10, 1984, wasn't it?

A Yes.

Q And Mr. Bertine's backpack didn't give any indication of containing either valuables or weapons, did it?

A I couldn't way until I looked in it.

Q But it was a closed container before you looked in it, wasn't it?

A Yes.

Q Once you looked in the backpack and looked -- and you saw the brown zippered

pouch, that was a closed container, wasn't it?

A Yes.

Q And that didn't give any indication of containing valuables or weapons, did it?

A Contained something, I couldn't say if it was valuable or weapons.

Q So you searched it?

A Yep.

Q When you opened the brown zippered container inside the backpack you saw four boxes. They were all closed containers, weren't they?

A Yes.

Q And none of them gave any indication of containing either valuables or weapons, did they?

A I couldn't say.

Q Until you searched them?

A Right.

Q Under subsection (B)(4), you have the authority to drive the vehicle off the

roadway and legally park the vehicle in the nearest public parking area, don't you?

A That's what it says, but I would contest that.

Q Officer, is this a procedure that was still in effect?

What are the dates of this memorandum?

A Effective date is September 7, 1977.

Q When is the expiration date?

A Indefinite.

Q Do you know if this memorandum has been modified or changed in any way?

A I don't believe it has yet.

Q And you were familiar with this on February 10, weren't you?

A Yes.

Q So you knew that you had the authority to move Mr. Bertine's car to a public parking lot, didn't you?

A I knew the policy said I could, yes.

Q But you made your own individual discretionary decision not to do that in this case?

A Yes.

Q And if you had chosen to tape and seal the backpack in it's closed condition and transport it with you to the police department, it could have been placed into property in that sealed, closed condition and Mr. Bertine could have retrieved it when he was released from jail; isn't that correct?

A I personally would not have done it that way, but it could have possibly been done that way.

* * *

Q (BY MR. LACKLEN) Officer, you didn't have any reason to believe that these containers contained contraband, did you?

A I didn't know what they contained.

Q These aren't normal containers in your experience for the storage or

transportation of contraband, dangerous drugs, or controlled substances?

A To my knowledge. This is the first time I have ever seen a can that looks like that.

Q Would it be fair to say that when you saw that can you became somewhat curious about what was inside of it?

A Yes.

Q (BY MR. LACKLEN) Officer Reichenbach, do you think it's possible that there were things in the trunk that you overlooked and didn't inventory?

A Sure.

* * *

REDIRECT EXAMINATION OF OFFICER REICHENBACH BY MR. HARIED [p.80, 1.12 - p.82, 1.7]:

Q You said that you would not have exercised your discretion to move this car and park it in a public area.' Can you explain what factors went into your decision?

A I had no idea if the truck was insured. If I was driving an uninsured truck and have an accident with it, I would be liable.

Q Did you finish your answer? I'm sorry, I didn't --

A Yes, I said I would be liable if I had an accident and I would also be violating the law.

Q Violating the law by driving an uninsured vehicle?

A Right.

* * *

Q From -- when you first picked up the backpack, before you opened it, you could tell that there were items of weight inside?

A Yes.

MR. LACKLEN: Objection. Leading.

THE COURT: It's been asked and answered before in any event.

Q (BY MR. HARIED) Could you tell without looking in whether those items of weight were, for example, a gun?

A I couldn't tell.

Q A knife?

A I couldn't tell.

Q A cherry bomb?

A I couldn't tell.

* * *

DIRECT EXAMINATION OF MALCOLM TOLEN

(TOW TRUCK DRIVER)

BY MR. LACKLEN

[p. 121, l.17 - p.124, l.20]:

Q Could you state your full name and spell you last name?

A Malcolm Frasher Tolen, T-o-l-e-n.

Q Mr. Tolen, how are you employed?

A I am a wrecker driver for Buff Conoco.

* * *

Q Once the vehicle is in neutral, you don't need to have access to the interior

of the vehicle in order to tow it and store it, do you?

A No.

Q Okay. Have you towed vehicles during your experience in Boulder County -- vehicles that you have taken into possession from the Boulder Police Department that have been sealed, the doors have tape on them where you actually couldn't get access to the interior of the vehicle?

A Yes.

* * *

Q Did you take any special procedures with that vehicle versus all of the other cars you towed for the Boulder Police Department?

A Other than being able to put it back into park to lock the wheels. I just had to block them because I couldn't get into it.

* * *

Q I will show you what has been marked as Defendant's Exhibit R for identification, and ask you if you recognize this picture?

A Yes, I do.

Q What does that picture represent?

A That's a section of the fence and part of the gate or part of the fence, anywhere. I don't know if that's the gate or not.

Q Where is that storage lot located?

A Turnpike Ford.

Q It's on the property of Turnpike Ford?

A Yes.

Q It's an open air storage, fenced-in lot?

A Yes.

Q How high is that fence?

A Six feet.

Q Does that go entirely around the storage lot?

A Yes, it does.

Q And is that storage lot kept locked unless somebody from Buff Towing is there?

A Yes.

Q Does any other towing company use that storage lot?

A No.

Q What security is provided in that area by Turnpike Ford or Buff Towing at night?

A Okay. We see that the yard is lighted at night. As far as any other security, I don't know if any supervisor provides any watchman or anything like that. I have seen quite a few in the area.

Q What have you observed when you brought cars there another night or been around there at night? What have you observed?

A I've seen police officers and security officers patrolling the area.

* * *

MR. LACKLEN: Mr. Tolen, to your knowledge has anything ever been stolen out of a vehicle stored in your lot?

A Not that I know of.

* * *

DIRECT EXAMINATION OF OFFICER TOPOREK

BY MR. LACKLEN

[p.134, l.17 - p.139, l.17]

Q And when you left, you asked officer -- the two officers that were there to do an inventory and impound of the car; is that right?

A I asked them to go ahead and impound the vehicle, yes.

Q Before you handcuffed and removed Mr. Bertine from the scene, did you ever discuss with him alternatives of what to do with his vehicle?

A No, I did not.

Q And that's an option that you have as a Boulder police officer in a custodial arrest, is it not?

A If certain variables exist, yes.

Q What are those variables?

A If there would be another licensed driver in the vehicle who, say, had not been drinking that could take control of the vehicle too. If the vehicle was illegally parked in a manner that would be a traffic hazard, then it couldn't be left at the scene.

Q It is an option to move the vehicle to a position where it's legally parked?

A I am not aware of it. I do not exercise that policy.

* * *

Q You don't impound every car you do a custodial arrest of the driver of, do you?

A I would probably say 99 percent of the time, yes, sir. Unless one of those other exists as far as another licensed driver there, if it is on private property, with the owners consent.

Q But you never use the portion of the policy that allows you to move the vehicle to a public parking lot?

A No, sir.

* * *

Q You are familiar with the park and lock procedure of the Boulder Police Department, aren't you?

A Vaguely.

Q You are aware that under the park and lock procedures if the officer decides to park and lock instead of impounds, one of the steps that the officer is to take -- one of the requirements is closed containers that give no indication of containing either valuables or weapon may not be opened and the contents searched, i.e., inventoried. You are aware of that policy in the Boulder Police Department, aren't you?

A If that's what the policy says. But again, I haven't reviewed it for quite

some time, so the exact wording I am not that familiar with.

Q If you are not familiar with the policy itself. Let's talk about the procedures you use when you do an inventory and an impound. Do you follow that regulation of not inventorying or searching a closed container?

A It would depend on the circumstances.

Q And the circumstances would be that the container would have to give some indication of containing either a valuable or weapon?

A Yes. And what my experience has dictated in the past, I guess.

* * *

Q Before you transported Mr. Bertine from the scene, you didn't ask him if he wanted to contact someone to take custody of his vehicle and his dog, did you?

A No, sir.

Q You know that his dog was going to have to go to the humane society and that

he was going to have to pay a fee to get his dog out?

A Most likely, yes.

Q You knew his car was going to be towed for a cost of $25, and $4 or $5 a day storage fee?

A Yes, sir.

Q You didn't give him any options regarding whether he wanted to follow that procedure or some other procedure?

A That's correct.

Q You didn't have any reason to suspect that his car contained any contraband or evidence of a crime, did you?

A No, sir.

Q And you didn't ask him if he wanted his car moved across the street catty-corner from where he was to be parked in the Basemar parking lot -- public parking lot and just locked there and left until he could retrieve it, did you?

A No, sir, I did not.

Q You didn't ask him whether he wanted to waive any liability for any personal items that were in the car even if the car was towed?

A No, sir.

Q Does the Boulder Police Department have a form where if you decide to leave a car on the street, instead of towing it, that the person can sign allowing you to do that? Protect you?

A Are you referring to the park and lock?

Q Make an arrest in the parking lot or a side street where the parking is legal.

Do you ever allow the person to leave his car there?

A If I understand your question, you would be referring to a private parking lot. Again, if it's legally parked off the side of the roadway, then depending on the officer, I would say -- or liability purpose or at least say that the person

did do it on his own accord, I might put it on the impound sheet. Cross cut impound and put park and lock and note per their request vehicle was legally parked and left if they did wish to have the car left there.

* * *

CROSS-EXAMINATION OF OFFICER TOPOREK

BY MR. HARIED

[p.142, 1.3 - 16]:

BY MR. HARIED:

Q Insurance and the lack of insurance and liability have been mentioned as two reasons not to move a car that's illegally parked and move it to a legal parking place. Are there any other reasons that you don't do that?

A For personal reasons. Not knowing his particular automobile. Any type of dysfunctions it may have. I would not, you know, drive a person's automobile.

Q Bad brakes, for example?

A Exactly.

Q Is it standard procedure if a car is to be impounded it's inventoried inside?

Q And out?

A Yes.

* * *

REDIRECT OF OFFICER TOPOREK

BY MR. LACKLEN

[p.142, l.20 - p.143, l.9]:

Q Officer Toporek, pursuant to a normal routine inventory, what kind of things would be inventoried in the car?

A That would I think be very individualistic as far as what an officer may or may not go into. I think whatever arouses his suspicious as far as what may be contained in any type of article in the car. A lot of times the glove compartments, any storage areas, certain containers inside the car could very well be gone through.

Q You wouldn't necessarily go into the smallest containers such as like ashtrays and things like that?

A I would.

Q And what would you been looking for in an ashtray?

A It could be any kind of jewelry, valuable item that is kept in the ashtray. I, a lot of times, myself, will stick a watch in the ashtray.

* * *

III. Ruling Of The Trial Court [Transcript, p.179-84]:

TUESDAY, JULY 10, 1984

PROCEEDINGS

(Defendant and counsel being present, the following proceedings were resumed:)

THE COURT: I've reviewed a number of the authorities that have been cited to me by counsel, as well as the exhibits in the case. And I'm prepared to make findings of fact and conclusions of law.

The Court finds that in the early morning hours of the day in question, the 10th of February, Officer Toporek did have reasonable grounds to believe that the defendant was driving under the influence of alcohol so as to stop him.

After doing so, defendant's responses, the manner of his speech, and the odor of alcohol on his breath gave the Officer probable cause to administer roadside sobriety tests. The defendant failed those tests. And as a consequence, the Court concludes that Officer Toporek was justified in arresting the defendant for driving under the influence and in taking him into custody.

The Court further finds that the Boulder police did follow their standard procedures with this defendant. Exhibit K gives considerable discretion to police officers. There's no duty under their standard procedures to inquire after the arrest, about his desire concerning the

alternative of parking and locking the vehicle.

The Court finds that the decision to impound the vehicle and the decision to do the type of search that was done were both made in good faith and were not due to the defendant's appearance, such as his shoulder-length hair or his full beard, nor due to the age or condition of his vehicle.

The word "inventory" in Exhibit K does mean a detailed inventory involving the opening of containers and the listing of contents. That is what Exhibit K calls for with a vehicle which is impounded. The Court has to find that the inventory in this case was somewhat slip-shod in so far as it related to the contents of the vehicle itself; that is, excluding the contents of Exhibit B, the backpack.

But if one compares Exhibit A, which pertains to the vehicle, and Exhibit L, the inventory pertaining to the backpack,

it becomes clear that the vehicle was inventoried first and the backpack later. And that the inventories were done by different people.

So the Court must conclude that the failure to list all of the contents of the vehicle does not mean that the inventory of the backpack was done in bad faith.

The Court further finds that the defendant did not ask to have the vehicle parked and locked. And the Court finds that there's no duty upon the police in a situation such as this to inquire to one's desire in that respect.

With respect to the criteria set forth in the Counterman case, the Court finds that the search of the backpack was done for the purpose of protecting the owner's property, protection of the police from subsequent claims of loss or stolen property, and the protection of the police from dangerous instrumentalities. It was not a pretext for an investigative search.

However, the Court also find that there were less intrusive means available for securing the property.

The critical items seized were not within plain view. They were inside metal containers, Exhibits C, D, and G, which were in turn inside a zippered bag, Exhibit E, which was in turn inside a zippered backpack. None of these gave any outward indication of containing anything dangerous. As the officers themselves testified, they could not tell what the contents of these various containers were, one way or the other.

The Court has to conclude that that search did not violate the defendant's rights under the Fourth Amendment to the United States Constitution. Case of Illinois against Larayette makes that clear.

The issue presented by this case is whether the state violated defendant's rights under Article 2, Section 7 of the

Colorado Constitution. In People against Grana, 185 Colo. [sic], the defendant was stopped for auto theft, and the car impounded. The search in that case was purported to be incident to the defendant's arrest. And the search extended from the passenger compartment into the trunk of the automobile, where a flight bag, a zippered flight bag, was discovered.

The Court held that because the search continued beyond the passenger compartment into the trunk, it exceeded the reasonable scope of a search incident to an arrest and had to be justified on other grounds. Our Supreme Court has held in other cases that a search incident to an arrest must be contemporaneous with the arrest itself. That was the ruling of People against Vaughns in 182 Colo. 328, and in Glass against The People, at 177 Colo. 267.

So, from the Grana case, the Court must conclude that although the backpack was found in the passenger compartment of the car, and itself could properly be seized incident to an arrest, the search of its contents must be justified as an inventory search.

Now, Grana does not cite the Colorado Constitution, it cites only the Fourth Amendment. The holding in that case is that because there's an expectation of privacy in the zippered flight bag, the search could not be done without a warrant as an inventory search. Counterman case cites not only Grana but also specifically Article 2, Section 7 of the Colorado Constitution. Counterman dealt specifically with a zippered backpack.

I agree with the District Attorney that the Counterman test, the various factors set forth in the Counterman decision, basically boils down to a test of reasonableness. And the mere fact

standing alone that less intrusive means were available does not mean, per se, that the inventory of all the contents was unreasonable.

However, there's no essential distinction on the facts between that case and this one. And I have to conclude on the basis of Counterman that this search, this inventory search as an inventory search, did violate Article 2, Section 7 of the Colorado Constitution.

I appreciate the gist of the Lafayette decision, or the rationale of it. And it may be that it is impossible to draw these fine distinctions as a matter of proper police administration. That becomes an important matter for our appellate courts, because in this case I have found, and would reiterate, that the evidence is clear that what happened here was in accordance with standard police procedure. It was not unusual, it was not specifically aimed at this particular

defendant for any reason. But those policy decisions should be made by the appellate courts, not by this one.

I think it is clear that our Supreme Court has been more protective of private rights against search and seizure than has been the present United States Supreme Court. The Lafayette decision does not overrule the Colorado courts' interpretation of Article 2, Section 7, as set forth in Counterman. And for that reason, I must suppress the contents in this case of Exhibit B, the backpack.

The case may present difficult questions for an appellate policy maker as to just how far you can go into a closed article. Could the police have legitimately inventoried the gross items of the zippered backpack, but not gone into the nylon kit? Could they have gone that far, but not into the metal containers that were in the zippered nylon

bag? I'll leave those questions for the appellate courts.

I find no essential distinction from Counterman, and that has to be the basis of my ruling, until and unless our appellate courts say that they will be interpreting our constitution in accordance with Illinois against Lafayette.

MR. HARIED: Thank you.

THE COURT: Is there anything I've left unaddressed?

MR. HARIED: I don't believe so.

THE COURT: Okay. We'll be in recess.

(The proceedings were concluded.)

IV. Appendix A

PEOPLE'S EXHIBIT K

BOULDER POLICE DEPARTMENT

BOULDER, COLORADO

OFFICE OF THE CHIEF OF POLICE

GENERAL PROCEDURE

DATE ISSUED: 07/19/77

PROCEDURE NO.: 77-GP-0-19

DATE EFFECTIVE: 09/07/77

EXPIRATION: Indefinite

CANCELLED PROCEDURE: None

SUBJECT OF PROCEDURE: MOTOR VEHICLE IMPOUNDS

TO: ALL DEPARTMENT PERSONNEL

I. Purpose

To insure the appropriate care and security of motor vehicles taken into custody by the Department.

II. Procedures

A. Upon placing a motor vehicle in Police custody, Officers shall take the following steps in

securing the vehicle and its contents:

1. If the vehicle or its contents have been used in the commission of a crime, or are themselves the fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.
2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.
3. The Officer shall request a Tow Truck, and upon its arrival have the Tow Truck operator sign the IMPOUND FORM, keeping one copy in his possession, before the

Officer releases the vehicle for impoundment in the City of Boulder impoundment facility.

B. The above procedure shall be followed when a vehicle involved in a traffic accident is to be held for evidentiary purposes.

III. Park and Lock Procedures

A. Upon placing the operator of a motor vehicle in custody, Officers may take the following steps in securing the arrestee's vehicle and property IF THE FOLLOWING CONDITIONS ARE PRESENT:

1. The vehicle and/or its contents ARE NOT themselves the fruit of a crime, nor has the vehicle or its contents been used in the commission of a crime.

2. The vehicle has not been involved in a traffic accident requiring its impoundment as evidence.

3. Vehicles should only be parked and locked with approval of the arrestee.

B. If the above conditions exist, the Officer may take the following steps to secure the vehicle:

1. Conduct a detailed vehicle inspection and inventory and record it upon a VEHICLE IMPOUND FORM. When possible, have a second Officer witness this inventory.

2. Closed containers that give no indication of containing either valuables or a weapon may not be opened

and the contents searched. (i.e., inventoried)

3. Personal items of value will be removed from the vehicle and subsequently placed into PROPERTY for safekeeping.
4. The Officer shall drive the vehicle off the roadway and legally park the vehicle in the nearest PUBLIC parking area. The date, time, and location where the vehicle is parked shall be indicated on the IMPOUND FORM.
5. The Officer shall remove the ignition keys, and lock all doors of the vehicle.
6. During the booking process, the arrestee shall be given a continuation form for his signature which indicates

the location of his vehicle. One copy of the continuation form is to be retained in the case file.

7. The arrestee shall be advised of the procedures required in obtaining personal property removed from the vehicle and placed into Property for safekeeping, i.e., TV's, valuables, etc.

8. The ignition key to the vehicle should remain with the items that are transported with the arrestee should this individual be incarcerated.

NOTE: Routine Motor Vehicle Impoundment Procedures should be used if no public parking areas exist in the immediate vicinity of the arrest, or there is reasonable risk of damage or vandalism

to the vehicle, or the arrested individual requests that the vehicle be impounded in the City's storage facility.

C. If the aforementioned conditions exist the Officer may, at his discretion, release the vehicle to a present individual designated by the arrestee after ownership is shown to be held by this individual, and the person so indicated shows proof of holding a valid motor vehicle operators license.

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-889

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE STATE OF COLORADO,
Petitioner,

v.

STEVEN LEE BERTINE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF FOR THE STATE OF COLORADO

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PETITION FOR CERTIORARI FILED NOVEMBER 22, 1985
CERTIORARI GRANTED MARCH 24, 1986

58 pp

QUESTION PRESENTED FOR REVIEW

Is a routine, good faith inventory search of closed containers in an automobile "reasonable" under the Fourth Amendment as interpreted by the Court in Illinois v. Lafayette?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1986

CASE NUMBER 85-889

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

STEVEN LEE BERTINE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE STATE OF COLORADO

OPINION BELOW

The opinion of the Supreme Court of Colorado is reported at 706 P.2d 411 (1985)(Pet. Cert. 25).

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on September 30, 1985. No petition for rehearing is permitted on an interlocutory appeal in Colorado. The petition for a writ of certiorari was filed in this Court on November 22, 1985 and was granted on March 24, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., §1257, and 1(b) and 1(c) of Rule 17 of the revised rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 10, 1984, Officer Toporek of the Boulder Police Department followed a 1957 panel truck weaving in traffic and traveling fifty to fifty-five miles per hour in a thirty mile-per-hour zone (J.A. 6-7). Upon stopping the vehicle Toporek observed the driver, Respondent in this case (hereinafter referred to as "Defendant"), to have a strong odor of alcohol on his breath, watery and glassy eyes, and slow speech (J.A. 10-11). The Defendant performed roadside sobriety maneuvers to determine whether he could drive his truck safely. In Toporek's opinion, the Defendant failed those tests (J.A. 12-14). Toporek arrested him for driving under the influence of alcohol and placed him in his patrol vehicle. Toporek then radioed Officer Reichenbach to come and impound Defendant's truck because it was parked in a lane of travel, thus obstructing traffic on a busy, four-lane

highway through the city of Boulder (J.A. 9, 14-16, 51).

At the hearing on Defendant's motion to suppress evidence, Toporek and Reichenbach testified that pursuant to Boulder Municipal Code[1] and the Boulder Police Department Regulations (J.A. 88) automobiles are routinely impounded when

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[1] Boulder Rev. Code §§7-7-2(a)(1) and -2(a)(4) provide:

> A peace officer is authorized to remove or cause to be removed a vehicle from any street, parking lot, or driveway when:
>
> (1) A vehicle is situated in a manner that obstructs the normal movement of traffic and the person in possession of the vehicle is not present or is unwilling or unable to provide for its immediate removal; [or]
>
> * * *
>
> (4) The driver of a vehicle is taken into custody by the police department.

Other subsections of 2(a) authorized impoundment under different circumstances affecting the public health, safety, and welfare.

they constitute a traffic hazard or when the driver is arrested. (J.A. 15-16, 19-22, 50-51, 63-66, 71-72, 77-79). They also testified that an inventory search routinely follows an impoundment (J.A. 19-20, 77).

Reichenbach arrived at the scene of the arrest at about the time Toporek left to take the Defendant to the Boulder Police Department for booking and a statutorily mandated blood alcohol test.[2] After calling animal control to remove a dog from the truck, Reichenbach began an inventory of the truck's exterior and its contents (J.A. 22-23). He testified that inventories are routinely done to protect the owner from having any valuable items stolen during the period of impoundment,

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[2] Colorado Revised Statutes (C.R.S.) §42-4-1202(3) (1973) requires that a blood alcohol test be performed upon the request of the police officer or arrested person. The test must be performed within one hour. C.R.S., §42-2-122.1(1)(a).

to protect the police department against false claims of loss, and to protect the police and public from dangerous items such as explosives or weapons (J.A. 19-22, 41).

On his inventory form Reichenbach noted jumper cables, a tire, a shovel, some sandbags, a three-quarter full can of beer, and damage to the exterior of the truck (J.A. 23). Reichenbach also discovered a brown backpack on the floor behind the front bench seat. Upon picking it up he could tell that it contained something because of its weight and obvious fullness (J.A. 24). Reichenbach testified that in his experience people in Boulder commonly use backpacks like purses for carrying valuable items such as wallets, purses, checkbooks, cameras, calculators, and textbooks (J.A. 25). He testified that previously he had found such things of

value as well as explosives and weapons in similar backpacks (J.A. 31, 46).

Inside the backpack Reichenbach found a heavy metal flashlight, hair brush, and other items (J.A. 28-29). Additionally, he found a tan zippered nylon bag containing several hard objects. He opened the nylon bag and observed inside three silver metal cannisters and one small Irish Mocha Mint coffee can (J.A. 27-33). Each of the metal cannisters was approximately three inches by five inches and one and one-half inches in depth. The cannisters had lids which were held in place by metal clips at each end. The coffee can had an ordinary plastic lid (R. 67). Reichenbach opened the cannisters and the coffee can to see whether they contained any items of particular value or potential danger that needed to be seized for safekeeping (J.A. 32). Inside of the cannisters and can he found cocaine-related paraphernalia, i.e. a

glass "tooter" and razor blades, approximately thirteen grams of cocaine packaged in individual bindles containing from a quarter-gram of cocaine to a half-gram of cocaine apiece, three qualudes, and seven hundred dollars ($700) cash (J.A. 33-36; R. 65). Having been a narcotics officer for several years, Reichenbach recognized the items for what they were, seized them, and completed the inventory. In an outside zippered pouch of the backpack Reichenbach found an envelope containing two hundred and ten dollars ($210) cash (J.A. 39-41). Reichenbach then had the car towed to a private impound lot and brought the backpack and contraband to the police station (J.A. 36). There he did a presumptive test on the cocaine and counted all the money before putting everything into the property and evidence room for safekeeping.

PERTINENT STATE COURT PROCEEDINGS

On February 16, 1984 the Defendant was charged with driving under the influence of an intoxicating liquor and possession of cocaine with intent to sell and distribute. After the preliminary hearing the Defendant was arraigned on May 8, 1984 and pled not guilty. The trial court set a motions hearing for July 9 and 10 with trial to begin on July 16, 1984 (Pet. Cert. 8; J.A. (ii)).

Defendant's motion to suppress alleged that the arrest was without probable cause, that the inventory search was pretext for general rummaging through the car, and that the search of the closed backpack and containers exceeded the permissible scope of an inventory search (J.A. 1-3).[3]

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[3] At the motion to suppress hearing in the trial court, the Defendant conceded that "based upon Illinois v. Lafayette, our federal argument is - has been

At the motions hearing the trial court heard evidence and ruled that there was probable cause to arrest, that the inventory search was conducted in good faith pursuant to routine police procedures and was not a pretext, and that the search of the backpack and its contents was lawful under the Fourth Amendment as interpreted in Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (J.A. 79-83). However, the trial court found that the search of the backpack violated Article II, Section 7 of the Colorado Constitution (which is substantially identical to the Fourth Amendment) as interpreted by the Colorado Supreme Court in People v. Counterman, 556 P.2d 481

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basically emasculated and I would agree with the District Attorney that in a valid inventory search, basically anything and everything can be searched." (R. 148-49.)

(1976)(J.A. 83-87). Thus, the trial court suppressed the search of the backpack on state law grounds.

The trial setting was vacated and on July 19, 1984, the People filed a Notice of Interlocutory Appeal with the Colorado Supreme Court pursuant to Colorado Appellate Rule 4.1 (Pet. Cert. 9). In the opening brief the People argued that Illinois v. Lafayette established the lawfulness of inventory searches of closed containers under the Fourth Amendment and that nothing in the Colorado Constitution or case law interpreting it required a different result. The Defendant, although represented by the Public Defender, did not file an answer brief.

On September 30, 1985 a majority of the Colorado Supreme Court affirmed the trial court's suppression of the inventory search of the backpack and its contents. The Colorado Supreme Court based its decision squarely and solely on the Fourth

Amendment, specifically stating that it did not reach the issue of the Colorado Constitution.

The state court distinguished Illinois v. Lafayette on the basis that it applied only to preincarceration inventory searches, not automobile inventory searches, because the governmental interest in inventorying closed containers found in vehicles is not as great as the governmental interest in inventorying closed containers brought with an arrested person to the booking desk of the jail. Finally, the Colorado Supreme Court balanced the governmental interest in inventorying the specific items - the three cannisters and coffee can - against the Defendant's privacy interests in those items. Using this container-by-container balancing test, the Colorado Supreme Court concluded that the inventory search of the cannisters and coffee can was "unreasonable" and affirmed the trial

court's suppression of the search, albeit on federal rather than state grounds. Two of the seven judges dissented, stating that the holding of Illinois v. Lafayette was not limited to inventory searches at the station house incident to incarceration of an arrestee, but also extended to inventory searches of automobiles because the same governmental interests apply in both situations.

SUMMARY OF ARGUMENT

In a long line of cases culminating in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Court has recognized that inventory searches of automobiles are reasonable under the Fourth Amendment. Throughout those cases the Court distinguished between investigatory searches, which require probable cause and a warrant or warrant exception, and inventory searches,

which are judged upon different criteria because they do not involve the usual Fourth Amendment concerns about protecting citizens from overzealous police activity.

South Dakota v. Opperman, supra, addressed the issue of automobile inventory searches generally, but did not consider whether the scope of inventory searches included the opening of closed containers found within an automobile. Subsequently, in Illinois v. Lafayette, supra, the Court addressed the issue of closed containers and held that routine inventory searches of closed containers incident to incarceration of an arrestee are reasonable under the Fourth Amendment.

This case presents the question of whether the holding of Illinois v. Lafayette, supra, applies to inventory searches of closed containers in an automobile. That question can be answered by comparing the individual's

privacy interests and the governmental interests in inventory searches in the two contexts: the booking desk and the automobile impound.

Whether at the booking desk or at the scene of the vehicle impoundment, the citizen has a privacy interest in closed containers in his possession.

Similarly, the governmental interests in inventorying closed containers is identical in both settings. Both at the booking desk and in an impounded automobile the police are frequently confronted with closed containers that hold items ranging from the very mundane to particularly valuable to extremely dangerous. These containers include purses, boxes, bottles, bags, backpacks, and many other items. Frequently, such containers do not give any external indication of their contents.

In both the booking desk and automobile impoundment settings, the

police, as part of their caretaking function, take custody and control of the personal property of citizens. As part of this caretaking function, the police officer, property custodian, and other people in the chain of custody must handle, inspect, label, transport, and store the closed container. The basic function of the police is the same in both settings.

The governmental interests in inventory searches at the booking desk or at the time of impoundment are the same. These include: (1) protection of the owner's property from theft or careless handling, (2) deterence of false claims of theft, and (3) protection of the police and public from dangerous instrumentalities. Contrary to the Colorado Supreme Court's reasoning, the booking desk does not present a more compelling setting for closed container searches than does the impoundment

setting. The Court has consistently rejected the "less intrusive means" approach required by the Colorado Supreme Court. Further, simply segregating closed containers does not satisfy the governmental interests involved because it deprives the police any meaningful opportunity to know what it is that they must handle, transport, and store.

An additional governmental interest supports the reasonableness of inventory searches of closed containers in automobiles. As the Court noted in Illinois v. Lafayette, supra, it is not feasible to draw constitutional distinctions between closed containers that may be inventoried and those that may not. In order to protect citizens and give the police clear guidance in the thousands of inventory searches conducted daily, a single familiar standard is necessary. This need is just as great in

automobile inventory searches as it is at the booking desk.

Many other courts have considered closed container searches during inventories of automobiles since the decision in Illinois v. Lafayette. The federal and state courts that have decided the issue on Fourth Amendment grounds consistently have concluded that Illinois v. Lafayette applies equally to automobile inventory searches. Those courts have rejected the "expectation of privacy" and "less intrusive means" arguments relied upon by the Colorado Supreme Court, and have found inventory searches of closed containers in automobiles reasonable under the Fourth Amendment.

ARGUMENT

Since South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), this Court has recognized the reasonableness of inventory searches of automobiles. This case presents a narrow issue: Whether the rule of Illinois v. Lafayette permitting inventory searches of closed containers applies to closed containers found during a routine inventory search of an automobile.[4] It is important to note what is not at issue in this case. Specifically, the trial court found that there was probable cause to arrest the Defendant and that the impoundment and inventory search of Defendant's vehicle was not a pretext for

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[4] After Illinois v. Lafayette one commentator has predicted that it is "doubtless the Court would reach precisely the same conclusion as to containers within inventoried vehicles." 2W. LaFave, Search and Seizure §7.4 at 262 (1984 Supp.) (footnote omitted).

a general evidentiary search, but rather was a good faith, routine inventory pursuant to standard police procedures (J.A. 80-81).

I. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT THE ROUTINE, GOOD FAITH INVENTORY SEARCH OF DEFENDANT'S BACKPACK WAS NOT REASONABLE UNDER THE FOURTH AMENDMENT.

Prior decisions of the Court have utilized a balancing of interests test when interpreting the Fourth Amendment's proscription against unreasonable searches. This analysis requires that the Court "balance [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Illinois v. Lafayette, supra, 462 U.S., at 644; 103 S.Ct., at 2608; citing Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). See also, South Dakota v. Opperman, supra, 428 U.S., at 367-77, 96 S.Ct., at

3096-3100, and 428 U.S., at 377-80, 96 S.Ct., at 3101-03 (J. POWELL concurring).

When assessing the constitutionality of inventory searches the Court has noted the differences between the police's two basic functions: the investigatory function and the caretaking function. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), and Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), the Court recognized that the police have a caretaking function concerning the property of citizens that is separate and distinct from their investigatory function. In those cases the Court upheld the warrantless inventory search of an automobile without probable cause on the basis that the police have the right to take protective measures concerning property in their custody and control.

Subsequently, in Cady v. Dombrowski, 413 U.S. 433, 441, 447-08, 93 S.Ct. 2523,

2528-31, 37 L.Ed.2d 706 (1973), the Court found lawful the warrantless search of an automobile without probable cause based upon the police "community caretaking function:"

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. * * * The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. * * * Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

The distinction between the investigatory and caretaking functions of the police was highlighted again in South Dakota v. Opperman, supra. There the Court noted numerous instances in which the police, in their caretaking function, take custody and control of automobiles, including vehicle accidents, abandoned vehicles, and illegally parked vehicles impeding traffic or threatening public safety. South Dakota v. Opperman, supra, 428 U.S., at 369-70, 96 S.Ct., at 3097. See also J. POWELL concurring, 428 U.S., at 378-80, 96 S.Ct. 3101-02. In all of these situations the police are acting not on probable cause, but in furtherance of the public interest.

The distinction between investigatory functions and caretaking functions is central to the Fourth Amendment analysis. As Justice Powell stated in South Dakota v. Opperman:

> The routine inventory search under consideration in this case does not fall within any of the established exceptions to the warrant requirement. An examination of the interests which are protected when searches are conditioned on warrants issued by a judicial officer reveals that none of these is implicated here. A warrant may issue only upon "probable cause." In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterpise of ferreting out crime." [Citation omitted.] Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based upon a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. Thus there are no special facts for a neutral magistrate to evaluate.

South Dakota v. Opperman, supra, 428 U.S., at 383-84, 96 S.Ct., at 3104. Likewise,

the plurality opinion in South Dakota v. Opperman stated that the usual Fourth Amendment privacy concerns are not present in the inventory setting:

> The Vermillion Police were indisputably engaged in a caretaking search of a lawfully impounded automobile. * * * As in Cady, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.

South Dakota v. Opperman, supra, 428 U.S., at 375-76, 96 S.Ct., at 3100.

Therefore, when the police have an investigatory purpose in opening a citizen's closed container, the Fourth Amendment requires probable cause and a warrant or an exception to the warrant requirement. Inventory searches are different; they have a caretaking purpose and are distinguishable from investigatory searches by the circumstances that give rise to the search and the scope of the

search. Thus, applying the balancing of interests test to inventory searches generally, the privacy interest of the citizen in items within his automobile is outweighed by the governmental interest in inventorying those items.

Those cases established the reasonableness of inventory searches generally, but did not specifically address the scope of such searches, i.e. the opening of closed containers.[5]

The only prior decision of the Court addressing the scope of inventory searches is Illinois v. Lafayette, supra. There the police lawfully arrested the defendant for disorderly conduct and took him to jail. At the booking desk his purse-type shoulder bag was searched for inventory

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[5] However, several of those cases involved a search of some form of closed "container." Cooper v. California, supra, (glove compartment); Cady v. Dombrowski, supra, (trunk); South Dakota v. Opperman, supra, (glove compartment).

purposes. Inside of a cigarette case package the police found ten amphetamine pills which formed the basis of criminal charges. The Court found that the inventory search of the defendant's purse-type shoulder bag and the cigarette case found inside was not "unreasonable."

The present case poses the question of whether the holding of Illinois v. Lafayette should apply equally to inventory searches of closed containers in automobiles. That question can be approached by resort to the Fourth Amendment balancing-of-interests analysis. Two questions must be answered: (1) are a citizen's privacy interests in closed containers in his automobile the same as or different than his privacy interests in closed containers taken with him to the booking desk?, and (2) are the governmental interests the same or different in these two settings?

A citizen's privacy interests in closed containers in his automobile are identical to his privacy interests in closed containers carried with him to the booking desk. For example, Mr. Bertine's backpack is analogous to Mr. Lafayette's purse-type shoulder bag. Both are containers commonly used for carrying personal items, whether ordinary or valuable. As Officer Reichenbach testified in this case, backpacks are commonly used for carrying valuable items such as wallets, purses, checkbooks, cameras, and other items (J.A. 25-26). Presumably, Mr. Lafayette's purse-type shoulder bag could have contained any of these items. Many items frequently found on an arrested person at the booking desk are similar to items commonly found in automobiles. These include purses, briefcases, wallets, backpacks, luggage, and other items. Whether located at the booking desk or at the site of a vehicle

impoundment when searched, the owner's privacy interests are identical.

Similarly, the governmental interests in inventorying closed containers are identical, regardless of whether the container is presented at the booking desk or is found inside of an automobile. In Illinois v. Lafayette, supra, the Court identified four governmental interests that support the reasonableness of inventory searches of closed containers at the booking desk. Those were: (1) deterrence of false claims of theft, (2) protection of the arrested person's property from theft or careless handling, (3) detection of dangerous instrumentalities for the benefit of the police, arrested person and other people in jail, and (4) to assist the police in ascertaining or verifying the arrested person's identity. Illinois v. Lafayette, supra, 462 U.S., at 646, 103 S.Ct., at 2609-10. These governmental interests

were drawn directly from

South Dakota v. Opperman, supra, 428 U.S., at 370, 96 S.Ct., at 3092.

In Illinois v. Lafayette the Court took guidance from

South Dakota v. Opperman, supra, saying:

> Our prior cases amply support this conclusion. In South Dakota v. Opperman, supra, we upheld a search of the contents of the glove compartment of an abandoned automobile lawfully impounded by the police. We held that the search was reasonable because it served legitimate governmental interests that outweighed the individual's privacy interests in the contents of his car. Those measures protected the owner's property while it was in the custody of the police and protected police against possible false claims of theft. We found no need to consider the existence of less intrusive means of protecting the police and the property in their custody - such as locking the car and impounding it in safe storage under guard. Similarly, standardized inventory procedures are appropriate to serve legitimate governmental interests at stake here.

Illinois v. Lafayette, supra, 462 U.S., at 647, 103 S.Ct., at 2610. Thus, the governmental interests in conducting inventory searches are identical in the booking and automobile contexts.

Likewise, the governmental interests in inventorying the contents of closed containers are identical in both situations. In both settings closed containers are temporarily taken into police custody. These containers can hold extremely valuable items such as diamonds, precious metals, money, travellers checks, checkbooks, and similar items. Such items require special handling both to protect against theft and to protect the police from false claims of theft.

Additionally, many types of closed containers commonly encountered during automobile inventories and at the booking desk can conceal dangerous items: e.g. boxes, sacks, tubes, purses, bottles, and paper bags. Any one of these containers,

without giving any definitive external sign of its contents, could contain a loaded gun, spring knife, razor blade, volatile chemical, or explosive.

During an automobile inventory search the police officer must move around inside the vehicle where closed containers are present and perhaps pick up closed containers to evaluate them (J.A. 22-23). He or she is exposed to whatever is inside the vehicle. Also, the tow company personnel must get into the vehicle to disengage the transmission before towing and then later to secure the brakes when the vehicle is parked at the impound lot. During this time the impound operator is exposed to whatever closed containers the police officer leaves inside the vehicle (J.A. 67-68).

If the police officer decides to seize a closed container for safekeeping, he or she inevitably must turn that item over to a property custodian at the

stationhouse who must handle, label, transport, and store the item. If closed containers are left in the vehicle by the police officer, the general public is exposed to any latent danger during the towing and storage of the vehicle.

It is not reasonable to require a police officer, tow operator, or property custodian to handle, transport, and store closed containers without some knowledge of the hazards or risks involved, nor is it reasonable to expose the general public to unknown dangers. See South Dakota v. Opperman, supra, 428 U.S., at 379, 96 S.Ct., at 3101-02 (J. POWELL concurring). In short, every interest that supports inventory searches of closed containers at the booking desk is equally compelling where closed containers are discovered in an impounded automobile.

Indeed, contrary to the Colorado Supreme Court's holding, the booking desk does not present a more compelling setting

for inventory searches of closed containers. An alternative to searching closed containers at the booking desk would be to separate the closed container from the arrested person and put it in some kind of locked storage unit. Once the container is removed there is no longer any threat of weapons or contraband being introduced into the jail.

This "less intrusive means" argument was rejected by the Court in Illinois v. Lafayette:

> [There may have been a less intrusive means,] but the real question is not what "could have been achieved," but whether the Fourth Amendment requires such steps; it is not our function to write a manual on administering routine, neutral procedures of the stationhouse. ***
>
> We are hardly in a position to second guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a

> person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Illinois v. Lafayette, supra, 462 U.S., at 647-48, 103 S.Ct., at 2610. Thus the governmental interests in inventorying closed containers are not greater at the booking desk than they are during automobile inventory searches.

Finally, there is a substantial governmental interest in having clear guidelines for the police to follow during automobile inventory searches. The Colorado Supreme Court failed to recognize the importance of this governmental interest. In its opinion, that court stated that the tin cans and coffee can searched in this case gave little indication that their contents were valuable or dangerous. In essence, the Colorado Supreme Court attempted to establish a hierarchy of closed containers based upon their external characteristics.

Under this scheme only those containers giving an external indication that their contents were dangerous or particularly valuable could be opened and inventoried.

Such reasoning ignores practicality. Certain facts about closed containers are inescapable. By their very nature they frequently do not give any external indication of their contents, and the only feasible method of determining whether they contain valuable or dangerous items is to look inside. For example, both a gun case and a cardboard box could contain a loaded weapon. In Illinois v. Lafayette the Court rejected the notion that the constitutionality of closed container searches turns upon whether the container gives an external indication of its contents: "It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns."

Id., 462 U.S., at 646, 103 S.Ct., at 2610.[6]

In Illinois v. Lafayette, supra, and New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Court recognized that "a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." Illinois v. Lafayette, supra, 462 U.S., at 648, 103 S.Ct., at 2611; New York v. Belton, supra, 453 U.S., at 458-60, 101 S.Ct., at 2863-64. Likewise, a single, simple standard for the scope of automobile inventory searches is necessary

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[6] See also United States v. Ross, 456 U.S. 798, 821-22, 102 S.Ct. 2157, 2170-71, 72 L.Ed.2d 572 (1982) (J. STEVENS stating "A constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases . . . , the central purpose of the Fourth Amendment forecloses such a distinction.")

for the protection of citizens and to give guidance to police officers.[7]

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[7] The "reasonableness" of closed container searches should not turn on a host of variables, as argued by the Colorado Supreme Court. Such an approach is essentially a "less intrusive means" test that is impractical.

For example, the Colorado Supreme Court found the inventory search in this case unreasonable because the defendant was available to make alternative arrangements for the care of his truck.

Here the Defendant was arrested for drunken driving. Was the arresting police officer supposed to decide whether the Defendant was too intoxicated, or sober enough, to make an intelligent decision? Was the arresting police officer supposed to drive the defendant to the nearest telephone, wait while he called several friends to see if anyone was willing to come out and pick up his car in the middle of the night, wait longer while the friend drove to the scene of arrest, and then check out the friend's sobriety and drivers license, knowing all the time that he has an obligation by law to have a blood alcohol test performed on the defendant within a short time after the arrest? The number of impossible decisions, all of which could affect the "reasonableness" of the policeman's decision to impound and inventory, is limitless.

II. OTHER COURTS HAVE CONSISTENTLY HELD THAT THE HOLDING OF ILLINOIS V. LAFAYETTE APPLIES EQUALLY TO THE OPENING OF CLOSED CONTAINERS IN AUTOMOBILES DURING A VALID INVENTORY SEARCH.

Since the Court's decision in Illinois v. Lafayette, supra, other courts which have addressed this issue have consistently held that the principles and reasoning of Illinois v. Lafayette control in the context of automobile inventory searches. These courts, both state and federal, have specifically rejected the elevated expectation of privacy argument upon which the majority opinion of the Colorado Supreme Court relied in this case. That argument was taken from Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The federal circuit courts which have examined searches of closed containers in

an automobile inventory context since Illinois v. Lafayette have unanimously found them reasonable. In United States v. Griffin, 729 F.2d 475 (1984), the Seventh Circuit addressed the lawfulness of opening and inventorying a tape-wrapped package found inside of a paper bag which was located in a closed storage compartment behind the passenger seat of an impounded vehicle. The court stated that the contents of the package "could have ranged from worthless sand to valuable diamonds to dangerous instrumentalities of a crime, including additional weapons, contraband, or explosives". Id., 729 F.2d, at 486. The Seventh Circuit went on to quote United States v. Markland, 635 F.2d 174, 176 (2nd Cir. 1980), cert. denied, 451 U.S. 991, 101 S.Ct. 2332, 68 L.Ed.2d 851 (1981): "This does not mean, however, that Officer Fragoso was required to take the plastic thermal package into his

custody with a 'pig in a poke' obviousness as to its contents. This impersonal package could have contained anything from beer to bullion or a bomb."

Other federal circuits which have addressed this issue since Illinois v. Lafayette include:

United States v. Rabenberg, 766 F.2d 355 (8th Cir. 1985) (although not a vehicle inventory, the opening of a gift-wrapped package and removing opaque plastic covering was proper);

United States v. Duncan, 763 F.2d 220 (6th Cir. 1985) (opening of trunk pursuant to inventory was proper); United States v. Laing, 708 F.2d 1568 (11th Cir. 1983) (rehearing followed Lafayette; opening of "Yahtzee" game box in trunk was proper; specifically stating Chadwick and Sanders should not alter scope of a valid inventory search); and

United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985) (opening of briefcase was

proper). The Petitioner has not located any federal decisions, subsequent to Illinois v. Lafayette, which have held the opening of a closed container in an automobile inventory search unlawful.

State courts permitting inventory searches of closed containers in vehicles following Illinois v. Lafayette are: State v. Bronaugh, 16 Ohio App.3d 237, 475 N.E.2d 171 (Ohio App. 1984) (suitcase and paper bag in trunk); People v. Gonzalez, 62 N.Y.2d 386, 465 N.E.2d 823 (N.Y. 1984) (paper bag concealed under dashboard); State v. Muralt, 376 N.W.2d 25 (N.D. 1985) (unlocked canvass bag in passenger compartment); Boggs v. Commonwealth, 331 S.E.2d 407 (Va. 1985) (bag in trunk); State v. Fortune, 236 Kan. 248, 689 P.2d 1196 (Kan. 1984) (noting the obvious trend is away from a "plain view" limitation on inventories, approved the opening of trunk to conduct inventory); Ciriago v. State, 57 Md.App. 563, 471 A.2d 320 (Md.App.

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State v. Gasparro, 194 Conn. 96, 480 A.2d 509 (Conn. 1984) (briefcase in passenger compartment); People v. Braasch, 122 Ill. App.2d 747, 461 N.E.2d 651 (Ill.App. 1984) (paper bag in trunk, whether open or closed, was a proper inventory).[8]

Even prior to Illinois v. Lafayette, the majority of courts that had addressed the issue of the opening of a closed container during an inventory search had found such a search to be reasonable under the Fourth Amendment. For example, in

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[8] The only state court decisions subsequent to Illinois v. Lafayette which have held a search of closed containers during an inventory search to be unreasonable have been based upon independent state constitutional grounds. See State v. Sierra, 692 P.2d 1273 (Mont. 1985) (preincarceration search of briefcase not valid inventory since less intrusive means available); State v. Ridderbush, 71 Or.App. 418, 692 P.2d 667 (Or.App. 1984) (search of black bag in preincarceration context illegal). Moreover, these cases are not vehicle inventory cases, but rather preincarceration searches.

Hamby v. Commonwealth, 279 S.E.2d 163 (Va. 1981), the Supreme Court of Virginia upheld the warrantless inventory search of an unlocked but zippered-shut briefcase found in the backseat of the defendant's car. In State v. Glenn, 649 S.W.2d 584 (Tenn. 1983), the Supreme Court of Tennessee held that it was lawful to inventory a closed container found in the trunk of a vehicle. In Glenn the court noted that an "impressive number" of jurisdictions have used similar reasoning in allowing the inventories of such closed containers as briefcases, suitcases, shaving kits, shopping bags and closed paper bags, and went on to cite to numerous authorities supporting this proposition.[9]

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[9] Cases cited in Glenn for this proposition are as follows: Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (Ga.1979) (plastic shopping bag); People v. Merchant, 86 Mich.App. 355, 272 N.W.2d 656 (Mich.App.1978) (contents of briefcase); In re One 1965 Econoline, Etc., 109 Ariz. 433, 511 P.2d

In summary, the overwhelming majority of courts which have addressed the search of a closed container in an automobile inventory context have looked to Illinois v. Lafayette for guidance and have found that such searches are reasonable. These courts have recognized that the three governmental objectives can only be furthered effectively by the opening of closed containers.

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168 (Ariz. 1973) (closed shaving kit); People v. Sullivan, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (1971) (briefcase); State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968) (closed paper bag); United States v. Ochs, 595 F.2d 1247, (2nd Cir.1979) (briefcase). See also, Robinson v. State, 418 So.2d 749 (Miss. 1982); Knight v. State, 398 So.2d 908 (Fla.App.1981) (latched vinyl case); State v. Crabtree, 618 P.2d 484 (Utah 1980) (luggage); Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (Ark. 1977); Lewis v. United States, 379 A.2d 1168 (D.C.App. 1977); Bennett v. State, 507 P.2d 1252 (Okl.Cr.App. 1973) (search under carpet of car); Urquhart v. State, 261 So.2d 535 (Fla.Dist.Ct.App. 1971), cert. den., 266 So.2d 349 (Fla. 1972); State v. Undorf, 210 Kan. 1, 499 P.2d 1105 (Kan. 1972); United States v. Markland, 635 F.2d 174 (2nd Cir. 1980) (zippered thermal bag); United States v. Gaultney,

CONCLUSION

The holding of Illinois v. Lafayette recognizing the reasonableness of closed container inventory searches should apply equally to inventory searches of automobiles. The individual and governmental interests in both settings are the same. Every governmental interest that supports the reasonableness of closed container inventory searches at the booking desk applies with equal force to the inventorying of closed containers found in impounded automobiles. Many lower court decisions since Illinois v. Lafayette have concluded that inventory searches of closed containers in automobiles are reasonable.

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581 F.2d 1137 (5th Cir. 1978), cert. den., 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 259 (Scrabble box taped shut); United States v. Davis, 496 F.2d 1026 (5th Cir. 1974) (briefcase).

Glenn also cited authority disallowing a search of a closed contaner in an inventory context. See 649 S.W.2d, at 586-87.

Finally, to give the law clarity and predictability in this area, a single familiar standard is needed.

For these reasons, the Petitioner asks that the Court reverse the decision of the Colorado Supreme Court and remand the case with instructions to return the case to the trial court for the setting of a trial.

Respectfully submitted,

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No. 85-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF COLORADO, *Petitioner*,

v.

STEVEN LEE BERTINE, *Respondent*.

On Writ Of Certiorari To
The Supreme Court Of Colorado

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the discretionary and pretextual inventory search of luggage is an unreasonable search and seizure under the Fourth Amendment?

2. Whether the routine field inventory search of luggage is justified, necessary and reasonable under the Fourth Amendment?

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PERTINENT STATE COURT PROCEEDINGS

The Respondent adopts the Petitioner's statement of the state court proceedings with the following additions and corrections.

The Respondent's motion to suppress evidence alleged that search of the van was not pursuant to a valid inventory search; that the search of the closed backpack and other containers exceeded the scope of a valid inventory search, citing *People* v. *Counterman*, 556 P.2d 481 (1976); that the search and seizure was in violation of Colorado Revised Statutes § 16-3-101 et seq.; Rule 41 of the Colorado Rules of Criminal Procedure; article II, section 7 of the Colorado Constitution; and the Fourth and Fourteenth Amendments of the United States Constitution. (J.A. 1-3).

On July, 1984, the People filed a Notice of Interlocutory Appeal with the Colorado Supreme Court pursuant to Colorado Appellate Rule 4.1(a)[1] The only appealable issue at this stage of the pre-trial state court proceedings was the trial court's order *granting* the defendant's motion to suppress in reliance upon article II, section 7 of the Colorado Constitution and Colorado case law. (J.A. 31, 39, 75, 83, 88). The trial court had *denied* defendant's motion to suppress based upon the Fourth and Fourteenth Amendments of the Constitution of the United States on the authority of *Illinois* v. *Lafayette*, 462 U.S. 640 (1983) (J.A. 83). This ruling was nonreviewable on

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[1] Rule 4.1 Interlocutory appeals in Criminal Cases. (a) Grounds. "The State may file an interlocutory appeal in the supreme court from a ruling of a district court granting a motion made in advance of trial by the defendant . . . to suppress evidence . . . provided that the state certifies to the judge who granted such motion that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

interlocutory appeal. Nor were the other trial court's rulings adverse to defendant's position interlocutorily reviewable; i.e., compliance with standard impound/ inventory procedure, pretextual investigatory search.[2]

The questions presented in the prosecutor's brief to the Colorado Supreme Court on interlocutory appeal were as follows:

1. Did the search of the backpack violate the Fourth Amendment to the United States Constitution?[3]

2. Should article II, section 7 of the Colorado Constitution be interpreted consistent with the Fourth Amendment to the United States Constitution with respect to inventory searches of closed containers?

3. Did the search of the backpack violate article II, section 7 of the Colorado Constitution, as that provision has been interpreted in recent decisions of this Court?

4. Assuming, *arguendo*, that this Court upholds the trial court's finding of a violation of the Colorado Constitution, should the remedy be suppression on the evidence found in the backpack?[4]

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[2] See footnote 1, *supra; People* v. *Weeams*, 665 P.2d 619, 623 (Colo. 1983) (defendant not entitled to interlocutory review of issues under Colorado Appellate Rule 4.1(a)).

[3] As noted in footnote 2 *supra* this was a nonreviewable issue on this interlocutory appeal because the trial court had agreed with the prosecution's position at the trial court level and denied the motion to suppress evidence on Fourth Amendment grounds. The Colorado Supreme Court's discussion of *Lafayette* is therefore advisory dicta.

[4] Here the prosecution raised the Colorado statutory good faith exception to the exclusionary rule, C.R.S. § 16-3-308. The Colorado Supreme Court did not mention or rule upon this issue in its opinion.

On September 30, 1985, a majority of the Colorado Supreme Court, in an opinion by Justice William Erickson,[5] affirmed the trial court's order granting the defense motion to suppress the evidence seized from the defendant's backpack. (J.A. 51). The trial court ruling, as previously noted, was grounded solely on article II, section 7 of the Colorado Constitution. Contrary to the statement in Petitioner's brief at 11, the Colorado Supreme Court did *not* base its decision squarely and *solely* on the Fourth Amendment and thereby avoid reaching the issue of the protections afforded by the Colorado Constitution.

The State supreme court stated:

> In the present case, although the district court suppressed the evidence on state constitutional grounds, the court concluded that the inventory search of defendant's rights under the United States Constitution. The [trial] court reasoned that *Illinois* v. *Lafayette*, 462 U.S. at 640 . . . rejected our fourth amendment analysis in *Counterman*. We disagree. 706 P.2d at 416.

The Court presents an extensive analysis of *Lafayette* as applied to the facts of this case and concludes:

> "[O]ur decision in *Counterman* is dispositive of the issues raised in this appeal. We therefore affirm the trial court's order suppressing the evidence. Because we view the search here as violative of fourth amendment protections, we need *not* decide whether article II, section 7 of the Colorado Constitution provides citizens of this state with *greater* protections than the United States Constitution in the area of automobile inventory searches.
>
> The trial court's suppression order is therefore affirmed. (Emphasis added.)

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[5] *People* v. *Bertine*, 706 P.2d 411 (Colo. 1985).

706 P.2d at 419.

The majority opinion interprets the state constitution *at least coextensively* with their interpretation of the Fourth Amendment. The Colorado supreme court never reached the only issue properly before it on the interlocutory appeal—the trial court's ruling that the inventory search violated the higher standard provided by article II, section 7 of the Colorado Constitutions for inventory searches. This issue awaits the state court and Petitioner upon any vacation of the decision of the lower court.

The factual situation in this case is therefore more complex, more contested, and less resolved by the lower court than indicated by Petitioner in his statement of facts. Many of the factual issues raised in respondent's motion to suppress were not addressed by the state supreme court because of the limited interlocutory nature of the prosecution's appeal (not allowing review of issues decided adverse to the defendant) or because the court's ruling made the consideration of those additional issues unnecessary.

STATEMENT

The Statement of the Case in Petitioner's brief contains inaccuracies and also omits facts which are material to the consideration of the questions presented.

The testimony at the suppression hearing showed that on February 10, 1984, at approximately 12:50 a.m., Mr. Bertine was driving south on Broadway Avenue which borders the University of Colorado campus. Officer Julius Toporek (Toporek) observed Bertine's 1957 panel truck speeding and changing lanes without signalling. (J.A. 6-8). Toporek followed the van and estimated the truck's

speed at fifty to fifty-five miles per hour. Toporek turned on his overhead lights and stopped Bertine near the intersection of two major avenues at the corner of the campus. Toporek approached the van and asked the driver, Steven Lee Bertine, for his driver's license and registration, which he produced. Mr. Bertine's appearance was described as shoulder length hair and full beard. (R. 51). His dog was the only other occupant in the vehicle. Boulder is a city with a large university student population. (J.A. 26). In talking to Bertine, Toporek detected a strong order of an alcoholic beverage on his breath.

After Toporek obtained the information from Bertine's driver's license, he notified the Boulder Police communications center by radio that he had stopped a possibly intoxicated driver. (R. 10). Officer Reichenbach (Reichenbach) was dispatched to the scene as a back-up patrol unit. (R. 10). Officer Reichenbach was a Drug Enforcement Administration trained narcotics officer. (J.A. 34).

Toporek returned to the truck and asked Bertine to step from the van and perform a series of roadside sobriety tests. Bertine complied with the request and began the roadside test. Bertine did not have any trouble understanding or responding to Toporek's instructions and questions. (R. 49, 130-131). He was cooperative. (J.A. 46). Reichenbach arrived just after Bertine had started the roadside tests. (J.A. 14).

Toporek concluded, based on his observations, that Bertine was intoxicated and advised him that he was under arrest for driving under the influence. After taking Bertine into custody, handcuffing him, and placing him in the front seat of his patrol car, Toporek asked Reichenbach to impound the truck. Toporek had not discussed the impoundment with Bertine. He did not ask Bertine if he

wanted to contact a third party to take custody of his truck and dog, nor give Bertine any options rather than having the truck towed. Bertine was also not asked if he would waive any police liability in lieu of an inventory. (J.A. 75). Bertine was not asked if he wanted his truck inventoried (J.A. 50). Reichenbach had no conversation with Bertine at all. (R. 42). An animal control unit removed Bertine's dog before Reichenbach entered the truck.

Officer Reichenbach testified that the first thing he does when he inventories a vehicle is "just look around throughout the vehicle to see if there is anything obvious that needs my attention." (R. 43). After quickly looking in the glove box, Reichenbach found a closed brown backpack directly behind the front bench seat in the middle of the vehicle. (J.A. 24, R. 43). He removed the backpack from the truck, took it back to his patrol vehicle, and began to search it. (R. 43).

The officer first unzipped the main compartment of the pack where he found, among other things, a separate opaque tan zippered closed nylon bag. (J.A. 32). He then unzipped this smaller nylon bag and found three opaque clip-locked, rectangular tin cannisters and a small "Irish Mocha Mint" coffee can with a plastic cover. The officer opened the double clip locks on the tin cannisters and found the contraband in issue. He also opened the coffee can and found additional contraband.

When Reichenbach began his search of the backpack, he knew Mr. Bertine's wallet was still on the front seat of the truck (R. 39), and he admitted that there was nothing suspicious about the backpack. (J.A. 47). Reichenback knew the average person on the street in Boulder carries personal items in backpacks (J.A. 26), but he also testified

that out of the thirty (30) to fifty (50) backpacks that he had searched as a police officer in Boulder, as many as twenty (20) to twenty-five (25) of them had contained controlled substances or drugs. (J.A. 47).

After searching the backpack, he went back up to the truck and "inventoried" the rest of the vehicle. (R. 45, J.A. 53). The tow truck was not called until after the "inventory" of the truck was started. (R. 70). He looked for any obvious damage on the outside of the truck (R. 45) and could see jumper cables, blankets, a sand bag, tire and shovel from outside the truck looking in. (R. 45). These items were listed on the impound sheet. (J.A. 53).

After the inventory search was completed, the van was released to a private tow truck company for removal to its private vehicle storage lot.

On cross-examination, Reichenbach testified that nothing about the backpack made him suspect it contained anything of significant value. (J.A. 49). The backpack, zippered pouch, cannisters and coffee can could have been sealed with evidence tape and stored until released to Bertine. (J.A. 48-49, 54, R. 64, 67). When the tin cannisters were removed from the nylon pouch, the tops were securely fastened with a clip on each end. (J.A. 34). Nothing indicated that they contained anything valuable or dangerous. (J.A. 54). Reichenbach had never seen tin cannisters like that before and he became "somewhat curious" about what was inside. (J.A. 65).

Although Reichenbach stated that he would have looked under the driver's seat during an inventory, he did not list a hydraulic jack (worth $30.00), a tripod jack, tire iron, or tire chains (worth $70.00), which were located there. (R. 62, 113). He did not remember those items being there. (R. 62). Reichenbach did not list the contents

of the glove compartment and could not recall anything "unusual" or "of significance" being there other than some papers. (R. 43, 63). When Bertine recovered the truck, the glove compartment papers were in complete disarray (R. 99), and an A.C. electrical converter (worth $25.00) was still in the glove compartment (R. 100). It was the largest item in the glove compartment and would have been impossible to overlook. (R. 100).

Bertine's wallet, left on the front seat, was searched but not inventoried before being placed into the defendant's property at the jail. (R. 41). Reichenbach couldn't remember whether or not the wallet contained credit cards and admitted that if a later claim had been made, he would not have known what had actually been in it at the time it was searched other than the $150.00 in currency which as placed into the property storage facility as evidence. (R. 41, 21).

A sealed white envelope marked "Rent" was found in the front zipped pocket of the backpack. It was torn open "because it felt like cash," but was never entered on the property or impound report. The $210.00 was mentioned only in the incident narrative report. (J.A. 41-42).

The written Boulder Police Department general procedures regarding motor vehicle impounds were admitted into evidence (J.A. 89-95). The testimony of the officers showed that the Boulder Police do not impound every car from which a custodial arrest of the driver is made (J.A. 51). Pursuant to Section III of the impound procedures, the car can be left legally parked on the street with the owner's consent, or released to a responsible third party (J.A. 51, 95). There is no distinction between an alcohol-related arrest and any other custodial traffic arrest, and the Boulder police do not impound every car in which a

drunk driver is arrested (J.A. 51, 59). The procedures allow an arrestee's car to be removed to any public parking area and left under a "park and lock" procedure. Such an area existed at the intersection where Bertine was stopped (J.A. 43). This procedure is sometimes used (J.A. 51). An inventory under a "park and lock" procedure *prohibits* the opening and search of closed containers that give no indication of containing either valuables or a weapon (J.A. 92, 61), while an *impound* of the vehicle requires a detailed vehicle inspection and inventory (J.A. 90). Reichenbach testified that he was familiar with the vehicle impound general order, and that he made "his own discretionary decision" not to move Bertine's car to the nearby public parking lot (J.A. 63-64). It is the individual officer's discretion whether to impound or park and lock (J.A. 60).

Even if an inventory is done, the officer has discretion about what items to inventory (R. 144). Toporek testified that the inventory and search of closed containers would "depend on the circumstances," and the officer's "individual preference" or "whatever arouses his suspicions as far as what may be contained in any type of vehicle." (J.A. 74, 87). Reichenbach would never search the trunk of a car without a search warrant (J.A. 44-45). Toporek would open the trunk "to see if anything of value needed to be listed" on the inventory (R. 144).

Bertine's truck was towed to a lighted private storage lot with a locked six-foot fence on the property of a local Ford dealership. (J.A. 69-70). The lot is patrolled by private security officers and police and nothing had ever been stolen out of a vehicle stored in the lot (J.A. 70, 71). Vehicles have been towed and stored with the doors tape sealed (J.A. 68) and once the transmission is in neutral, access to the interior is unnecessary for towing and storage (J.A. 67-68). In cost Mr. Bertine $34.00 for the tow and

storage of his truck and $24.00 to get his dog released from the pound. (R. 110).

SUMMARY OF THE ARGUMENT

I. The inventory exception rationale is based upon the non-investigatory and non-discretionary nature of the search. In this case, there is evidence that the search was not routine and had an investigative intent and therefore was not a valid inventory.

II. The Fourth Amendment normally requires a warrant to be issued before the instigation of a search. The warrant must be based upon probable cause. Searches not complying with the warrant requirement are invalid and any evidence seized during such a search is subject to exclusion. However, there are exceptions to the warrant requirement.

The constitutionality of these exceptions is based on the reasonableness of the search. Reasonableness is determined through balancing the individual's privacy interests against the governmental interests in the intrusion.

Although there are exceptions, an automobile inventory search is not one that would allow the warrantless search of luggage or a closed container found in an automobile.

This Court, in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) and *United States* v. *Chadwick*, 433 U.S. 1 (1977), recognized that luggage, as repositories of personal effects, was not subject to the automobile exception to the warrant requirement.

In *Sanders*, the Court held that luggage was not subject to a search merely because it was found in a moving automobile. The Court reasoned that there was no more

compelling interest to search luggage taken from an automobile than from any place else.

The *Chadwick* Court first enunciated the principle that luggage was not subject to a search due to its nature. In *Chadwick* it was argued that the privacy interests in luggage were similar to that in an automobile. This reasoning was rejected, as luggage once seized is not mobile and luggage does not have a diminished expectation of privacy like an automobile.

The Court in *Sanders* concluded that if a search of luggage found in an automobile was to be justified without a warrant, some exception other than that applying to automobiles must be utilized.

The petitioner attempts to justify the warrantless search of respondent's backpack under the inventory exception to the warrant requirement under *South Dakota* v. *Opperman*, 428 U.S. 364 (1978) and *Illinois* v. *Lafayette*, 462 U.S. 640 (1983).

Although this Court has recognized an automobile inventory search in *Opperman* and a preincarceration stationhouse inventory search in *Lafayette* to be exceptions to the warrant requirement, neither of these exceptions are applicable to the case at bar.

III. The inventory of Bertine's backpack was unreasonable since the interests advanced to justify it were outweighed by his privacy interests in the luggage. *Opperman*. Although *Opperman* upheld the inventory search of a car, it did not authorize an inventory of a repository of personal effects. In *Opperman* the Court held that a routine automobile inventory, found by lower courts to be essential to perform caretaking functions, was reasonable.

Implicit in *Opperman*, however, is a limitation: an inventory must be reasonable in scope. Consequently, many of the courts considering inventories of containers have employed this same analysis in finding such searches unreasonable in scope. There is a greater expectation of privacy in a container than in an automobile and such expectation is not reduced by the location of the container. Furthermore, safeguarding a backpack presents none of the substantial burdens involved in caretaking automobiles. *Arkansas* v. *Sanders*, 442 U.S. 753 (1977). Courts have thus found virtually no need for the inventories since the containers can be sealed, secured and inventoried as a unit.

The petitioner urges that *Opperman* be extended to authorize luggage inventories, relying on four interests purportedly necessitating them: safeguarding the property, protecting the police from claims of lost or stolen property, preventing harm to police, and ascertaining or verifying identity. Sealing, securing and inventorying containers as a unit adequately serve the first three interests. Thieves or vandals can have no access to the locked property. Similarly, inventorying containers without opening them actually minimizes property claims since the contents will never have been touched by police. The fourth interest, the need to ascertain identity, is generally served by merely asking for identification.

In this case there was no need to inventory the contents of the luggage. Officer Reichenbach concluded that no danger existed and the contents could easily have been safeguarded by sealing the backpack. Other facts suggesting the inventory was unreasonable were the failures: to seek Bertine's consent, to advise him of the purpose of the inventory, and to permit him to make other arrangements for the caretaking of his truck and belongings.

Therefore, because there was no need to inventory the contents of the backpack in which Bertine has a substantial expectation of privacy, the inventory was unreasonable.

IV. Similarly, the *Lafayette* case is inapposite to the case at bar. The justification for allowing the preincarceration stationhouse invenory search in *Lafayette* was the compelling governmental interests in preventing contraband and dangerous objects into the jail environment. This fundamental governmental interest was viewed by the Court to outweigh the individual's limited privacy interest in articles in his possession at the stationhouse. This Court was emphatic in stressing the limited scope of this case to stationhouse searches incident to incarceration. The obvious problem, therefore, in applying *Lafayette* to the present case is that the search of Mr. Bertine's luggage was not carried out in the stationhouse prior to incarceration. Thus, the compelling governmental interest of *Lafayette* does not exist here.

Since Mr. Bertine's individual privacy interests are not diminished, nor the governmental interests compelling, the rationales of *Opperman* and *Lafayette* are equally inapplicable to the present case.

V. The single familiar standard in the field inventory of luggage and closed containers should be narrowly drawn to protect the substantial privacy interests in these repositories of personal effects. The rule of *Robbins* v. *California* would provide a doctrinal framework for preventing unrestricted, pretextual inventory searches in the field. By prohibiting the opening of luggage and closed containers except when the contents are in plain view or are reasonably believed to be dangerous, the Court will properly balance the privacy interests and legitimate gov-

ernmental interests involved in the field inventory context.

ARGUMENT

I. THE SEARCH OF BERTINE'S BACKPACK WAS NOT A VALID INVENTORY BECAUSE OF ELEMENTS OF NONROUTINE DISCRETION AND INVESTIGATIVE MOTIVE.

The validity of the inventory search of the contents of Steven Bertine's backpack cannot withstand scrutiny under minimal prerequisites of a valid inventory—lack of arbitrary discretion and standardized procedures. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

The facts of this case and the testimony of the two Boulder police officers involved in the seizure and search of the truck, the backpack, and its contents show that the officers had considerable discretion as to whether to initiate an impound or to "park and lock" the truck in a public parking space. (J.A. 60) This discretion regarding impoundment directly affects the permissible scope of the subsequent inventory depending upon which safekeeping procedure is selected.

The lack of investigative motive in the routine inventory search is the crucial factor which saves the search from scrutiny under the warrant clause of the Fourth Amendment. The facts of this case show that the initial investigative motive of the search of the backpack was later justified by a "routine" impoundment and inventory.

A. The Impound/Inventory Procedure Gave Unbridled Discretion As To The Scope Of The Inventory Search.

The individual's expectation of privacy must be protected from "arbitrary invasions solely at the unfettered discretion of officers in the field." *Delaware* v. *Prouse*, 440

U.S. 648 (1979); *Brown* v. *Texas*, 443 U.S. 47 (1979). It is this lack of discretion which saves the routine inventory search from scrutiny under the warrant clause. As Justice Powell explained in *Opperman:*

> The officer [in an inventory search] does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized.
>
> A related purpose of the warrant requirment is to prevent hindsight from affecting the evaluation of the reasonableness of a search . . . In the case of an inventory search conducted in accordance with standard police department procedures, there is no significant danger of hindsight justification. 428 U.S. at 383.

Justice Powell further states:

> More importantly, no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope. 428 U.S. at 384.

The Solicitor General argues (Brief at 10) that in the case of an inventory search, the officer "does not make a discretionary determination to search," quoting Justice Powell above.

The trial court found that the Boulder police procedure gave *considerable* discretion to the police (J.A. 80). The officers had three alternatives in this case: seize and tow the truck; park and lock the truck in a public parking area; or release the truck to a designated third party. (J.A. 92-94). The regulations also anticipate consultation with

the owner regarding his desires regarding disposition of his property. (J.A. 92-94).[6]

These regulations prohibit the opening and inventory search of closed containers "that give no indication of containing either valuables or a weapon when the vehicle is parked and locked." (J.A. 92-93). A reasonable argument can be made that this language regarding the limited scope of the inventory of closed containers would apply even under the impoundment procedure. *See People* v. *Counterman*, 192 Colo. 152, 556 P.2d 481 (1976). This limiting scope language is a direct quote from the *Counterman* opinion. *Id.* at 485.

The decision to tow or to park and lock is committed totally to the unguided discretion of the individual police officer, (J.A. 63-64).

The only limitation on the *scope* of the resulting inventory is contained under the "park and lock" procedures section which *forbids* the search of closed containers. It is difficult to understand this distinction in the procedures if the same governmental interests of protection from liability and dangerous instrumentalities are actually served in both situations.

The practical effect of this discretionary procedure is to leave the owner of the automobile subject to the unbridled

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[6] Respondent would endorse and incorporate the American Civil Liberties amicus position that any lawful impound or inventory of a citizen's property be *preconditioned* on consultation and consent by the owner when the owner is present. *See*, Appendix A-samples of department regulations.

whim of the officer in the field.[7] This is precisely the discretion to invade private property which this Court has consistently circumscribed by a requirement that an established, standardized police department procedure exist and be followed. *Opperman* at 376; *Lafayette* at 647.

There is no evidence that the police were following a "routine" or "standard" procedure that in any manner limited their discretion to choose the targets of their tow and inventory procedures rather than "park and lock."

The impermissible discretion in the officers' decision to inventory and tow in this case is reflected in Reichenbach's definitional criteria—any vehicle "used in the commission of a crime." *Any* car involved in a traffic offense/arrest situation would quality. (J.A. 59).

The standardization of the process and forms once the decisions to impound/tow has been made does not minimize the risk of arbitrary and discriminatory searches.

"This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979).

In both *Opperman* and *Lafayette*, the decision to inventory was non-discretionary. All abandoned cars were

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[7] As the state court noted: "Although the procedure followed in this case was officially authorized, the officer also had the option of either sealing the vehicle before it was towed away, or driving the vehicle to the nearest lot and locking it. The Boulder Police Department regulations and rules do not require that an automobile be inventoried and searched in accordance with the procedures followed in this case. *People* v. *Bertine*, 706 P.2d at 413.

impounded and inventoried. All arrestee's personal belongings were seized and inventoried. Officer Reichenbach's discretion as to the method of implementation in securing Bertine's truck taints the "routine" nature of the subsequent inventory. *Delaware* v. *Prouse*, *supra*; *Brown* v. *Texas*, 443 U.S. 47 (1977).

B. There Is Evidence Of A Pretextual Inventory Search To Conceal An Investigative Motive.

> If there is some showing that a certain inventory was a subterfuge, as where only suspicious items are scrutinized and the other contents are not removed and inventoried, the evidence must be suppressed. 2. W. Lafave, *Search and Seizure* (1978) (hereinafter LaFave), § 5.5, p. 360.

Despite the trial court's finding to the contrary and the state court's rule of nonreviewability of such rulings against the defendant on an interlocutory appeal, the Court should be reluctant to formulate standards of national impact on such a record.

The trial court found that the inventory of the vehicle was "slip-shod" (J.A. 81). It actually was a "sham." Narcotic officer Reichenbach's clear motive was a search for contraband. As the long-haired, bearded, young Bertine was driven away to the stationhouse, Reichenbach "just looked around" the panel truck to see if there was "anything obvious that need[ed] [his] attention." (R. 43). After rummaging through the personal papers in the glove compartment (but failing to list or remove the electrical converter), his attention turned immediately to the backpack behind the front seat. (J.A. 24, R. 43). Reichenbach removed the backpack from the truck and took it back to his patrol car for the thorough inspection. (R. 43). The trial court found that the "inventory listing items in the backpack was done much later by someone else." (J.A.

82). Reichenbach had previous experience with such backpacks and knew his chances were good of locating contraband (J.A. 47). It was only after the complete and probing search of the containers within the backpack and the anticipated discovery of contraband that Reichenbach decided to call the tow truck to justify his inventory (R. 70). The testimony at the suppression hearing was uncontradicted that Reichenback ommitted more items of valuable property in the truck than were included on the impound sheet. (R. 41, 62, 110, 113).

In *State* v. *Gluck*, 83 Wash.2d 424, 518 P.2d 703 (1974), the Court was confronted with just this type of inventory. The evidence was suppressed because the search could not be justified as an inventory, where the officers abandoned the search after finding incriminating evidence and a complete list of other items in the vehicle was *not* made. *See also, United States* v. *Abbott*, 584 F.Supp. 442 (W.D. Pa. 1984); *State* v. *Knight*, 621 P.2d 370 (Hawaii 1980).[8]

The inventory of Bertine's truck was a procedure of unreasonable scope that was a pretext concealing an investigative motive. *Opperman* at 376. This Court should not condone it with its approval.

II. AN AUTOMOBILE INVENTORY SEARCH IS NOT AN EXCEPTION TO THE WARRANT REQUIREMENT WHICH WOULD ALLOW THE WARRANTLESS SEARCH OF LUGGAGE OR A CLOSED CONTAINER FOUND IN AN AUTOMOBILE.

This Court has consistently interpreted the Fourth Amendment of the United States Constitution to require

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[8] *See, State* v. *Miller*, 420 A.2d 181 (Del. Super. 1980); *In the Matter of B.K.C.*, 413 A.2d 894 (D.C. App. 1980); *Miller* v. *State*, 403 So.2d 1307 (Fla. 1981); *Manalansan* v. *State*, 45 Md. App. 667, 415 A.2d 308 (1980); *People* v. *Siegel*, 95 Mich. App. 594, 291 N.W.2d 134 (1980); *State* v. *Peterson*, 583 S.W.2d 277 (Mo. App. 1979); *Thompson* v. *State*, 83 Wis.2d 134, 265 N.W.2d 467 (1978).

that a search of private property be performed pursuant to a search warrant. *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979).

The "warrant requirement" was made fully applicable to the states by the Fourteenth Amendment to the United States Constitution. *Id.* at 758 n.4 (citing *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Wolf* v. *Colorado*, 338 U.S. 25 (1949).)

Further, "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn." *Jones* v. *United States*, 357 U.S. 493, 499 (1958).

The Fourth Amendment itself states the applicable test for a constitutional warrantless search to be one of reasonableness: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." (emphasis added.) This Court has set out guidelines to assist in this determination.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. *Wolfish*, 441 U.S. 520, 559 (1979). This test has been generalized to be a balancing of the individual's privacy interest against the governmental interests in pursuing the search.

The State of Colorado asserts that an inventory search of an automobile by the government is a reasonable exception to the Fourth Amendment warrant requirement. The

State further asserts that this should allow the warrantless search of luggage or a closed container found inside a properly seized automobile.

A. A Search Of Luggage Is Not An Exception To The Warrant Requirement Even When Such Luggage Is Found In An Automobile.

Persons possessing luggage are protected against warrantless searches of this property even when such luggage is found in an automobile. This right exists in spite of the "automobile exception" and is due to the owner's expectation of privacy in the luggage. *Arkansas* v. *Sanders*, 442 U.S. 753 (1979); *United States* v. *Chadwick*, 443 U.S. 1 (1977).

Courts have sustained the constitutionality of warrantless searches of automobiles under the "automobile exception" to the warrant requirement. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925).

Such an exception exists due to the nature of automobiles. Automobiles are mobile and always requiring a warrant for a search might be impracticable. *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976) (citing *Carrol* v. *United States*, 267 U.S. 132 (1925)); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Further, an automobile has a diminished expectation of privacy due to the pervasive governmental regulation, inspection, and possible caretaking of automobiles. *Id.* at 368. Automobile travel is also public.

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares

where both its occupants and its contents are in plain view.

Cardwell v. *Lewis*, 417 U.S. 583, 590 (1974). The mere fact, however, that luggage is found within an automobile does not render the luggage subject to a warrantless search under the automobile exception. *Sanders*, 442 U.S. at 753.

In *Sanders*, police received reliable information that the defendant would be carrying contraband in a green suitcase when he arrived at the airport. The defendant did appear carrying the described suitcase. He placed the suitcase in a taxi and then drove off. The police then stopped the taxi and made a warrantless search of the suitcase. Marijuana was found inside. *Id.* at 755.

On appeal to the Arkansas Supreme Court the evidence seized in the search of the suitcase was suppressed. This Court affirmed, stating that it would not allow the search of luggage merely because it was found in an automobile. "Accordingly, as a general rule, there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." *Id.* at 764.

Sanders heavily relied on the findings in the case of *United States* v. *Chadwick* 433 U.S. 1 (1977). In *Chadwick*, the reasons for constitutional warrantless searches of cars were compared to that of luggage. The Courts held that luggage is a repository for personal effects, and unlike a car, persons possessing luggage are protected against a warrantless search. *Id.*

Chadwick involved the warrantless search of a footlocker which had been placed in the truck of a car. The police had probable cause to believe that the footlocker contained contraband. This Court upheld the suppression

of the contraband seized in the search, and rejected the reasoning that a search of luggage was like that of a car. Luggage does not have the same mobility as a car:

> Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station . . . there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained.

Chadwick at 13.

More important to the Court was the fact that luggage is private.

> The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker . . . . Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile. *Id.*

From the preceding decisions it is clear that luggage cannot be searched under the automobile exception or by reasoning that luggage is analogous to an automobile. At the very least, a backpack, such as the one possessed by Mr. Bertine, is a repository of personal effects and fits the analysis under *Chadwick* and *Sanders*.

Therefore, in the case at bar, Mr. Bertine's backpack, sitting behind the seat when the police officer found it, was subject to the rules that had been set out in *Chadwick* and *Sanders*. Namely, that Mr. Bertine was protected against a warrantless search subject to the automobile exception, and that his expectation of privacy concerning the contents of his backpack was not diminished.

In order to search Mr. Bertine's backpack another exception that applies must be found. "Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway." *Sanders*, 442 U.S. at 766. *See also, United States* v. *Place*, 462 U.S. 696, 706-707 (1983) (privacy interest in contents of personal luggage).

Even where exceptions to the warrant requirement have allowed warrantless searches of closed containers found in automobiles, a preliminary showing of probable cause has still been required. *New York* v. *Belton*, 453 U.S. 454 (1981) (search incident to a lawful probable cause arrest of the occupant of an automobile may extend to the contents of any containers found within the passenger compartment of the car); *United States* v. *Ross*, 456 U.S. 798 (1982) (probable cause to search an automobile allows search of any containers found therein). The recent cases of this Court involving searches of containers in automobiles thus indicate that containers found in an automobile may be searched only upon a prior determination of probable cause, either as to the container itself or as to the automobile within which it is located; and unless a recognized exception to the warrant requirement exists, either for searching the container or the car, a warrant must be obtained to search the container.

Thus, while a reasonable automobile inventory search pursuant to established procedures is permissible, the search of any closed containers found therein must be based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant.

III. THE INVENTORY SEARCH OF BERTINE'S BACKPACK WAS UNREASONABLE BECAUSE BERTINE HAD A HIGH EXPECTATION OF PRIVACY IN THE CONTENTS OF THE BAG AND THERE WAS NO NEED FOR THE POLICE TO SEARCH INSIDE IT.

The inventory "search"[9] of the contents of Steven Bertine's backpack cannot withstand scrutiny under the Fourth Amendment standard of reasonableness—the standard which inventory searches must meet. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). Essentially, the test for determining reasonableness involves a balancing of the interests advanced to justify the intrusion against the interest of the individual in the privacy of his effects. *Camara* v. *Municipal Court*, 387 U.S. 523-37 (1967); *Opperman*, 428 U.S. at 377-78 (Powell, J., concurring). In applying this test this Court should examine "all the facts and circumstances of this case in light of the principles set forth in . . . prior decisions." 428 U.S. at 375.

A. Opperman Did Not Authorize Inventory Searches Of The Contents Of Repositories Of Personal Effects, Such As Luggage, In Which There Is A High Expectation Of Privacy.

The Court in *Opperman* found that the inventory search of the contents of a glove compartment in an auto-

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[9] Whether or not an inventory constitutes a "search" for Fourth Amendment purposes would not appear to be a critical question in this case since the state has never argued that the inventory was exempt from the Fourth Amendment standard of reasonableness. *South Dakota* v. *Opperman*, 428 U.S. 364, 371 n.6 (1976). In any event, Bertine's position is that an inventory does constitute a search. *See South Dakota* v. *Opperman*, 428 U.S. at 377 n.1 (Powell, J., concurring); 428 U.S. at 385 n.2 (Marshall, J., dissenting). *See also* 2 W. LaFave, *Search and Seizure* § *5.3*, at 306 & n.23 (1978). The petitioner's and government's briefs concede as much.

mobile which had been lawfully impounded met the reasonableness standard. It must be emphasized, however, that the instant case involves an inventory of a different nature: a search of luggage.

There are fundamental distinctions between automobile and luggage inventories. The expectation of privacy in the contents of luggage, a repository for personal effects, is substantially higher than that in an automobile. As was noted by Justice Powell in a concurring opinion in *Rakes* v. *Illinois*, 439 U.S. 128, 153-54 (1978): "Nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations." Moreover, as this Court has recognized, the expectation of privacy in repositories accompanying or being carried by a person at the time of arrest is not reduced by virtue of an arrest. *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977); *Arkansas* v. *Sanders*, 442 U.S. 753, 766-67 (1979) (Burger, C.J., concurring).

Not only are the privacy interests distinct, but the need to conduct a search in each type of inventory is different. Unlike the significant burdens and specific problems involved in the caretaking of automobiles, which make an inventory search occasionally necessary, no comparable burdens or problems are involved in safeguarding repositories of personal effects such as backpacks. *Arkansas* v. *Sanders*, 442 U.S. at 765 n.14. Accordingly, there is no need to conduct an inventory of the contents of luggage that can be safely stored.

A close look at *Opperman* demonstrates that its holding is *limited to its facts* and does not authorize the search of repositories of personal effects. In *Opperman*, the Court concluded that routine inventory searches of the contents

of lawfully impounded abandoned automobiles were reasonable. Interests recognized to justify such intrusions included: (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen property; and (3) protection of the police from potential danger.[10] 428 U.S. at 369. These interests favoring intrusion were found to outweigh the citizen's interest in the privacy of the contents of his automobile, particularly since that privacy interest was recognized to be significantly less than the expectation of privacy associated with one's home. The Court noted that the practice of inventorying the contents of an automobile had been almost uniformly found by the states to be "essential to respond to incidents of theft or vandalism." 428 U.S. at 369.

With respect to the record before it in *Opperman*, the Court upheld the routine inventory search of the contents of a glove compartment. The Court noted that the car had been legally impounded, the owner was not present to make other arrangements for the safekeeping of his belongings, and the routine inventory was prompted by the presence in plain view of certain valuables. 428 U.S. at 375.

The Court also found, in footnote ten, that "[t]he inventory was not unreasonable in scope." 428 U.S. at 376 n.10. The principle implicit in this footnote, that the scope of an inventory search is not unlimited, was addressed as well in the concurring and dissenting opinions. Justice Powell, in a concurring opinion, observed that the Court's holding

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[10] The Court also noted the frequent need to determine whether a vehicle had been stolen and thereafter abandoned. 428 U.S. at 369. This interest does not apply to the inventory of an arrestee's effects and is not presented on the facts or claimed by the state.

provided no general license of the police to examine all the contents of automobiles, such as letters or checkbooks. 428 U.S. at 380 & n.7. Justice Marshall, in a dissenting opinion, agreed with Justice Powell's observation and noted that the Court's opinion did not authorize the search of containers which could be sealed, removed and secured without further intrusion. 428 U.S. at 388 n.6. Consistent with these statements, a large number of courts which have addressed the question have concluded that an inventory search of luggage and other removable containers in a vehicle is unreasonable in scope.[11]

Opperman thus does not authorize the search of contents of repositories such as backpacks.

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[11] *United States* v. *Wilson*, 636 F.2d 116 (8th Cir. 1980); *United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979); *State* v. *Prober*, 98 Wis.2d 345, 297 N.W.2d 1, 7 (1980); *United States* v. *Vallieres*, 443 F.Supp. 186, 191 (D.Conn. 1977); *State* v. *Pace*, 171 N.J. Super. 240, 408 A.2d 808, 813 (1979); *State* v. *Houser*, 95 Wash.2d 143, 622 P.2d 1218, 1226-28 (1980); *State* v. *Downes*, 285 Or. 369, 591 P.2d 1352 (1979); *State* v. *Bramlett*, 94 N.M. 263, 609 P.2d 345, 347-48 (Ct.App. 1980); *Obermeyer* v. *State*, 97 Nev. 158, 625 P.2d 95, 96-97 (1981); *Manalansan* v. *State*, 48 Md. App. 667, 415 A.2d 308 (1980); *Smith* v. *State*, 48 Md. App. 425, 427 A.2d 1064, 1065 (1981); *People* v. *Grana*, 185 Colo. 126, 527 P.2d 543, 545 (1974); *State* v. *Keller*, 265 Or. 622, 510 P.2d 568, 570 (1973); *State* v. *McDougal*, 68 Wis.2d 339, 228 N.W.2d 671, 678 (1975); *State* v. *Gwinn*, 301 A.2d 291, 294 (Del. 1972); *People* v. *Counterman*, 192 Colo. 152, 556 P.2d 481, 485 (1976); *People* v. *Miller*, 110 Mich. App. 270, 312 N.W.2d 225, 228 (1981); *State* v. *Roth*, 305 N.W.2d 501 (Iowa 1981), *cert. denied*, 454 U.S. 870 (1981); *People* v. *Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346, 1352 (1980), *cert. denied*, 453 U.S. 923 (1981); *State* v. *Morgan*, 3 Kan. App.2d 667, 671, 600 P.2d 155, 159 (1979); *State* v. *Potter*, 8 Kan. App.2d 52, 648 P.2d 1162, 1165 (1982); *People* v. *Salter*, 91 Ill. App.3d 831, 414 N.E.2d 1252, 1255 (1980); *State* v. *Daniel*, 589 P.2d 408, 417 (Alas. 1979).

B. Opperman's Holding That An Inventory Search Of An Automobile Was Reasonable Should Not Be Extended To Validate An Inventory Of The Contents Of Luggage.

Numerous courts which have considered a search of the contents of an arrestee's repositories of personal effects have found it to be beyond the scope of a permissible inventory.[12] These courts find that there is virtually no need to search the contents of the containers since they can simply be sealed, secured and inventoried as a unit. This caretaking procedure is found to be workable and reasonable by these courts.

The state, nevertheless, urges this Court to extend *Opperman*'s holding to searches of the contents of luggage and other repositories. The various interests that are advocated by the state as grounds for conducting an inventory search of the contents of a repository for personal effects such as a backpack are (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen property; (3) the need to prevent harm to the police; and (4) the need to ascertain or verify identify.

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[12] *United States* v. *Monclavo-Cruz*, 662 F.2d 1285, 1288-90 (9th Cir. 1981); *United States* v. *Schleis*, 582 F.2d 1166, 1172-73 (8th Cir. 1978); *United States* v. *Cooper*, 428 F.Supp. 652, 654-55 (S.D. Ohio), *aff'd*, 564 F.2d 100 (6th Cir. 1977); *United States* v. *Davis*, 501 F.Supp. 23, 26 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981); *State* v. *Kaluna*, 55 Haw. 361, 520 P.2d 51, 60-62 (1974); *Reeves* v. *State*, 599 P.2d 727, 735-36 (Alas. 1979); *Bradford* v. *State*, 401 N.E.2d 77, 80 (Ind. App. 1980); *People* v. *Helm*, 89 Ill.2d 34, 431 N.E.2d 1033, 1034-35 (1981); *Hicks* v. *State*, 398 So.2d 1008, 1010 (Dist. Ct. App. Fla. 1981). *See also United States* v. *Mills*, 472 F.2d 1231, 1240-41 (D.C. Cir. 1972); *People* v. *Hamilton*, 74 Ill.2d 457, 386 N.E.2d 53 (1979).

There is virtually no need, however, for the police to search inside luggage in order to advance these interests. Sealing, securing, and inventorying the bag as a unit achieves the first three interests and the fourth interest—the need to verify identify—in most cases will be advanced by simply asking the arrestee to produce identification as was done in this case.

1. Sealing, Securing And Inventorying A Backpack As A Unit Safeguards The Property, Protects The Police From False Claims, And Protects Police From Dangerous Instrumentalities.

The interests generally recognized to justify an inventory—protection of the owner's property, protection against claims of lost or stolen property, and police safety—are served be sealing, securing, and inventorying the property as a unit. In the first place, sealing, securing and inventorying a container as a unit, without inventorying its contents, safeguards the police from claims or disputes over lost or stolen property. The police are actually less likely to be accused of theft or loss of the contents if the container "has never been opened and its contents have never been removed, reshuffled and replaced." *United States* v. *Bloomfield*, 594 F.2d 1200, 1202 (8th Cir. 1979). As Professor LaFave has noted:

> "False claims cannot be avoided and seem more likely when the contents are handled and inventoried (a time when, the owner might later claim, some of his property was taken), as compared to when the container is immediately sealed." 2 W. LaFave, *Search and Seizure § 5.5*, at 360 n.50 (1978). *See Opperman*, 428 U.S. at 378-79 (Powell, J., concurring); 428 U.S. at 391 (Marshall, Jr., dissenting).

Furthermore, safeguarding property as a unit places no burden on the police. In the first place, the police already

perform similar functions, such as that associated with the caretaking of evidence. Secondly, simply listing "one backpack" on an inventory sheet is less burdensome than listing the pack as well as its contents. *See United States* v. *Hill*, 458 F.Supp. 31, 37 (D.D.C. 1978).

Many of the courts addressing this question thus recognize, as did the state court in this case, that securing containers of personal effects as a unit is better than inventorying the contents of the container.[13] Indeed, as the state court in this case found, there was no need to search inside Bertine's backpack because there was a secure impound lot available. The backpack could also have been secured in the police evidence room.[14]

Moreover, protecting the police from potential booby-traps and explosives would be better accomplished by

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[13] *See, e.g., United States* v. *Monclavo-Cruz*, 662 F.2d 1285, 1289 (9th Cir. 1981); *State* v. *Gwinn*, 301 A.2d 291, 294 (De. 1972); *People* v. *Helm*, 89 Ill.2d 34, 431 N.E.2d 1033, 1035 (1981); *State* v. *McDougal*, 68 Wis.2d 399, 228 N.W.2d 671, 678 (1975). *See also* 2. W. LaFave, *Search and Seizure* § 7.4, at 571-72 (1978); Comment, 1968 U. Ill. L.F. 401, 407-08.

[14] The Government in its amicus brief cites *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976), and *Cady* v. *Dombrowski*, 413 U.S. 433, 447, and argues that the reasonableness of an inventory does not depend on whether the police interests in making the intrusion can be accomplished by less intrusive means, such as securing the repository as a unit. A careful reading of the cited case shows that the Court was referring to less intrusive means which were *unreasonable* by virtue of their prohibitive cost or the heavy burden they would involve. This is the precise point recognized in *Opperman*, i.e., that the less intrusive alternative of posting a security guard at the car-impound lot would be prohibitively expensive. 428 U.S. at 379 (Powell, J., concurring). "No comparable burdens are likely to exist with respect to the seizure of personal luggage." *Arkansas* v. *Sanders*, 442 U.S. at 765 n.14.

securing the container as a unit. As one court has noted, it would be foolhardy to blindly and routinely search every container for explosives and booby-traps. *United States* v. *Cooper*, 428 F.Supp. 652, 655 (S.D. Ohio 1977). *See* LaFave, § 5.5, at 360 n.50 (1978); *see also Illinois* v. *Lafayette*, 462 U.S. 640, 649 (Marshall, J., concurring); *Cf. United States* v. *Chadwick*, 433 U.S. 1, 15 (1977); *id.*, at 17, and n.2 (Brennen, J., concurring).

This is not to say that all repositories being inventoried may never be searched to check for explosive devices or dangerous instrumentalities. If the police have reason to believe that a certain repository contains some immediately dangerous instrumentality, then it should be searched in a professional manner. *United States* v. *Chadwick*, 433 U.S. 1, 15 n.9 (1977).

This case, however, does not contain any exigent circumstances. Bertine was arrested for driving under the influence. The arresting officer was not in any fear of his safety and did not find it necessary to even conduct a pat-down search of Bertine.

Accordingly, a search inside the backpack was not needed to safeguard the property, protect the police from false claims, or dangerous instrumentalities since the officer could have simply inventoried the backpack as a unit, sealed it, and secured it in the van or in the police evidence room.

2. Other Considerations In This Case, Including The Absence Of Consent To Search, Military Against Upholding The Stationhouse Inventory.

Additional factors in this case support a finding of unreasonableness. For example, the inventory was conducted without Bertine's consent and he was not advised of the purpose of the inventory. Moreover, he apparently was not given an opportunity to make other arrange-

ments for the safekeeping of his truck and belongings. Furthermore, since Bertine was arrested for a traffic offense, the police would very likely have retained custody of his belongings for only a short period of time until he was able to post a bond. *See United States* v. *Davis*, 501 F.Supp. 23, 26 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981). Even after being arrested for possession of controlled substances, Bertine was released the next afternoon (R. 111).

All of these factors show the search was unreasonable. Certainly, it would have been consistent with Fourth Amendment principles to seek Bertine's consent, and provide him an opportunity to have someone retrieve his truck and belongings.[15] Lower courts recognize that these factors merit great weight and find inventory searches to be unreasonable where the arrestee was not asked for consent or given an opportunity to make other arrangements for the caretaking of his belongs.[16]

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[15] The need for the owner's consent was advocated by the dissent in *Opperman*, but rejected in the opinion of the Court since the lack of consent apparently would not protect the police from claims of lost of stolen property or protect the public from vandals who might obtain a firearm. 428 U.S. at 376 n.10. Unlike automobiles, the backpack can be secured within the confines of the station or a secured storage area and protected from theft, loss and vandals. The consent theory advanced by the dissent in *Opperman* thus merits renewed consideration, under the facts of this case.

[16] *See, e.g., Zehrung* v. *State*, 569 P.2d 189, 193 (Alas. 1977), *modified*, 573 P.2d 858 (1978); *United States* v. *Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980); *State* v. *Killcrease*, 379 So.2d 737 (La. 1980); *State* v. *Hatfield*, 364 So.2d 578 (La. 1978); *State* v. *Schmidt*, 359 So.2d 133 (La. 1978); *State* v. *Mangold*, 82 N.J. 575, 414 A.2d 1312 (1980); *Gaston* v. *State*, 155 Ga.App. 337, 270 S.E.2d 877 (1980); *State* v. *Southwell*, 369 So.2d 371 (Dist. Ct. App. Fla. 1979). *See also*, 2 W. LaFave, *Search and Seizure* § 7.4, at 571 (1978) ("[T]here is much to be said in

In sum, the state's position that *Opperman*'s holding is controlling in this case should be rejected. As Bertine has shown, he had a high privacy interest in the contents of his backpack. Moreover, in contrast to the essential need to conduct automobile inventories, the police had no need to search inside his backpack in order to achieve inventory objectives. The state's position ignores the fundamental distinctions that exist between these two types of inventories. Its argument that *Opperman*'s holding should extend to this case because the search was an "inventory" conducted pursuant to "routine procedure" essentially amounts to an indiscriminate use of labels to avoid a serious constitutional question. Justice Cardozo described this use of labels as follows:

> "A fertile source of perversion in constitutional theory is the tyranny of labels . . . [A] court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1933).

Because Bertine's privacy interest outweighed the need for the intrusion, the search was unreasonable. Consequently, the judgment of the state court should be affirmed.

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favor of the proposition that the police should [conduct an] inventory . . . when the owner . . . is at hand only if he elects that alternative.")

See also, United States v. *Wilson*, 636 F.2d 1161 (8th Cir. 1980); *State* v. *Jewell*, 338 S.2d 633 (La. 1976); *State* v. *Mangold*, 82 N.J. 575, 414 A.2d 1312 (1980); *State* v. *Goff*, 272 W.Va. ____ 272 S.E.2d 457 (1980); *State* v. *McDougal*, 68 Wis.2d 399, 228 N.W.2d 671 (1975).

IV. THE INVENTORY SEARCH UPHELD IN ILLINOIS V. LAFAYETTE WAS A PREINCARCERATION, STATIONHOUSE INVENTORY SEARCH AND IS INAPPLICABLE TO THE SEARCH OF A CLOSED CONTAINER FOUND IN AN AUTOMOBILE.

The holding of *Illinois* v. *Lafayette*, 462 U.S. 640 (1983) is quite specific and limited in scope. "We hold that it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." *Id.* at 648. In such situations the inventory search is restricted to searching the items in the possession of an arrested person while in the stationhouse. The Court was so committed to the limited scope of this decision that it followed the above holding with the following footnote. "The record is unclear as to whether respondent was to have been incarcerated after being booked for disturbing the peace. This is an appropriate inquiry on remand." *Id.* at 648, n.3. Therefore, if on remand it was determined that respondent was not to have been incarcerated, then the search would not have been incident to incarceration and thus unreasonable and invalid.

To the extent that *Lafayette* has any bearing on the present case at all, it is that the Court reaffirms its commitment to the balancing of an individual's privacy interests versus government interests. *Id.* at 2608. In the stationhouse, however, the Court applies this test by noting additional fundamental exigencies in the government's interests. Here, the Court acknowledged a more compelling governmental interest in the stationhouse. "Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs, or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weap-

ons—can be concealed in innocent looking articles taken from the arrestee's possession." *Id.* at 646. The need to protect against *such* risks arises independently of even the particular officer's subjective concerns at the moment of the search. *Id.*

In fact, the Court went as far as to say that "the governmental interests underlying a stationhouse search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest. *Id.* at 645. With the governmental interests so strong in a stationhouse setting, it is unlikely that the individual's limited expectation of privacy would ever be great enough to outweigh them; the one possible exception being a strip search, on which the court did not rule. *Id.* at 645.[17]

The petitioner's argument that the holding of *Lafayette* controls in the field inventory context is based on the fallacious conclusion that there are "identical" interests in each situation. This assumption ignores the fundamental principle underlying *Lafayette*—"the *evolution* of interests along the continuum from arrest to incarceration." 462 U.S. at 644.

The scope of the stationhouse search will invariably be more intrusive that that conducted in the field. The exigencies of the context demand it. Conversely, the field inventory search, conducted long after the arrestee has been safely removed from the scene should be much *less* intrusive. The governmental interests are minimal.[18]

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[17] The holding in *Lafayette* does not rely on the search incident to arrest exception to the warrant requirement as Justice Marshall's concurring opinion points out. *Id.* at 2611 (Marshall, J., concurring).

[18] Nor should the Court adopt an "accelerated" inventory search rationale to justify the search of luggage found at the scene of an arrest. *People* v. *Laiwa*, 34 Cal.3d 711, 669 P.2d 1278 (1983).

The petitioner assumes that *Lafayette* has eliminated any necessity of further balancing of the contending interests in different inventory contexts. The resulting equation of the jailhouse inventory with all other types of inventories is blind to the complexity of life within which the Fourth Amendment exists.

The petitioner also argues that the "reasonableness" of Reichenbach's conduct needs no further analysis than that it was permitted under a departmental regulation. The review of the reasonableness of that vague rule allowing "a detailed vehicle inspection and inventory" (J.A. 90) is not to be allowed because to do so would be to "second guess" the police department. *Lafayette* at 648. Thus, the petitioner argues for the Court to simply abdicate its responsibility to enforce the Fourth Amendment by conferring unreviewable authority on the police. *See* Note, *Illinois* v. *Lafayette: has the Fourth Amendment Vanished in the Face of Administrative Expediency?* 21 Cal.W.L.Rev. 218 (1984).

As the state court correctly states:

> [U]nconstitutional searches cannot be constitutionalized by standardizing them as part of normal police practice. Even though routine procedures have been followed, courts should not blind themselves to police practices that sanction an unlimited intrusion into areas where an individual clearly possesses a reasonable expectation of privacy. Simply put, the rights secured by the fourth amendment cannot be eliminated by administrative fiat. (citation omitted.) *Bertine*, 706 P.2d at 419.

This Court's reluctance to become embroiled in administrative procedures ensuring the safety of a jailhouse or a prison should not require abandonment of vigilance for reasonable expectations of privacy in society as a whole.

V. THE SINGLE FAMILIAR STANDARD FOR THE FIELD INVENTORY OF CONTAINERS SHOULD BE NARROWLY DRAWN TO PROTECT SUBSTANTIAL EXPECTATIONS OF PRIVACY.

It may "be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers of items may be . . . sealed as a unit" in certain contexts. *Lafayette* at 648. Certainly in situations such as the potentially volatile booking search within the stationhouse security setting, *Illinois* v. *Lafayette*, 462 U.S. at 648; the probable cause search of a mobile vehicle, *United States* v. *Ross*, 456 U.S. 798, 821 (1982); the search incident to arrest in inherently dangerous, rapidly unfolding street arrest, *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979), the need for "bright lines" and "single familiar standards" are paramount so that it is "possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Belton* at 458.

The "continuum of interests" demands a different analysis in the non-exigent context of the routine field inventory search. The impound officer *can* be expected to exercise a reasonable, ad hoc judgment with respect to the containers, luggage and other repositories of highly personal effects which he may encounter. This is not to say that the Court should not attempt to formulate some standard which is respectful of the substantial expectation of privacy in personal effects protected by the fouth amendment. The "Bertine" rule advocated by the United States Solicitor and the petitioner intrudes too far into these protected interests. Governmental expediency should not allow the "inventory" to become the talisman before which the Fourth Amendment disappears. There

are risks in formulating constitutional rules broader than required by the facts to which they are applied. *Arkansas* v. *Sanders*, 442 U.S. 753, 766 (Burger, Jr., concurring).

The opening and search of "all containers taken from arrestees and containers found in their vehicles" will create a rule far broader than that of *Belton* or *Ross*. The privacy expectation of the innocent accident victim whose car or luggage falls into police custody will be less than that of the *Chadwick* drug smuggler, the *Belton* arrestee, or the *Ross* criminal automobile owner. The carefully hewn parameters of the valid warrantless search of containers will be cast aside before the demands of administrative procedures. *See Wagner* v. *Higgins*, 754 F.2d 186, 190 (6th Cir. 1985).

Professor LaFave, one of the fathers of the "bright line" rules,[19] now laments the over-expansive *Belton*-type rule suggested by the petitioner here as:

> [N]o less than an invitation to subterfuge, for police wishing to search a car but lacking grounds to do so need only await the commission of some minor offense by the driver or other occupant and then arrest before the search.[20]

Indeed, the suggested *Bertine* rule of inventory search of closed containers will permit container searches in the trunk of the vehicle not permitted even under *Belton*, and of containers excluded under the probable cause standard of *Ross*.

The court must be cognizant of the impact of such an inventory exception in other areas of fourth amendment

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[19] LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 S.Ct. Rev. 127, 142.

[20] LaFave and Isreal, *Criminal Procedure*, Vol. 1, 276 (1984).

analysis. The emerging "inevitable discovery" rule of *Nix* v. *Williams*, 467 U.S. 431 (1984) has resulted in approval of otherwise unlawful searches incident to arrest based on the inevitable discovery of the evidence through a routine inventory search. *See, e.g., United States* v. *Andrade*, 784 F.2d 1431 (9th Cir. 1986). This convergence of exceptions to fourth amendment protections has prompted at least one circuit judge to mark "the passing of still another important part of the protection of the Fourth Amendment," and the resulting encouragement of illegal and unconstitutional searches. *Id.* at 1433-34. (Reinhardt, C.J., concurring.)

In *New York* v. *Class*, ___ U.S. ___, 106 S.Ct. 960, 969 (1986), the petitioner, State of New York, argued the convergence of *Opperman, supra*, and *Nix* v. *Williams, supra*, as an alternative theory justifying the police search of a vehicle incident to an arrest. The Court did not reach those issues in its opinion.

More frightening is the fact that federal courts have already been confronted by prosecutorial arguments legitimizing warrantless searches of homes or hotel rooms on the inventory exception rationale. *See United States* v. *Ladson*, 774 F.2d 436 (11th Cir. 1985); *United States* v. *Parr*, 716 F.2d 796 11th Cir. (1983) (fireman protective search for valuables); *United States* v. *Lyons*, 706 F.2d 321 (D.C. Cir. 1983) (hotel room "inventory" after arrest of occupant).

The Court should not strike so deeply at cherished expectations of privacy. There is little justification and no *necessity* for such a sweeping rule. Respondent would suggest a compromise between the conflicting interests based upon the rule of *Robbins* v. *California*, 453 U.S. 420 (1981). The rule would state that:

> A closed piece of luggage or other closed container which is subject to a lawful inventory procedure is

> constitutionally protected by the fourth amendment and shall not be opened *unless* its contents are in plain view or are reasonably believed to be dangerous. Otherwise, it shall be inventoried as a unit.

This "single familiar standard" is capable of general application by police officers engaged in the non-exigent routine caretaking function of a standardized inventory procedure without fostering subterfuge and pretextual police conduct. The individual's reasonable expectations of privacy in his personal effects will be adequately protected while not significantly impacting the legitimate governmental interests in a property inventory. The right to be free from unreasonable searches and seizures should not be reduced to the size of the smallest pearl or gem that one might possess.

CONCLUSION

Under the unique facts of this case, the decision of the Colorado Supreme Court invalidating the inventory search of luggage and closed containers was correct. The judgment of the lower court should be affirmed. The opinion of the Court should explain that the inventory search in this case violated the fourth amendment inasmuch as it was undertaken without consultation with and approval by Steven Lee Bertine and the scope of the inventory went beyond those items which were reasonably believed to be dangerous or were in plain view.

Respectfully submitted,

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APPENDIX A

Copies of the following police department regulations have been lodged with the Clerk's Office of the United States Supreme Court:

1. Cincinnati Police Department, General Order 12.270 Impounding, Moving and Release of Vehicles (motor vehicle subject to impoundment *shall not be impounded* if: (a) vehicle can be safely and legally parked at its location; (b) driver is able to arrange care of vehicle after being given reasonable opportunity to do so—officer must so notify the driver).

2. Metro-Dade Police Department, Dade County, Florida Property and Evidence Control No. 4-12, Standard Operating Procedure, November, 1984 (I.B.I.—Prior to towing vehicle, driver *shall* be afforded reasonable opportunity to provide for removal of vehicle within a reasonable length of time. Various alternatives available are: (a) vehicle may be released to another person, (b) vehicle may be parked and locked, (c) vehicle may be towed in manner provided by driver.

I.C.I.—Inventory: When a vehicle, per owner's request, is not towed or impounded, there is *no* authority for an inventory of the vehicle and contents.

I.D.3.—Neither the County nor individual officer shall be held liable for any damage to, theft of, or theft *from* a vehicle when the owner or driver has elected not to remove the vehicle. *See also*, Dade Metro Ordinances, Ch. 30-384(a)(6).

3. Drug Enforcement Agency *Agent's Manual* 12/5/75, p. 62 (4/28/78) 5-7.2. Impoundment Inventories (situations in which agent might have legal duty to protect vehicle and its contents—when a subject arrested in vehicle cannot personally arrange its storage, the vehicle cannot be left at the scene.)

4. Jacksonville, Florida, Office of Sheriff, *General Order* No. 70-4E. Towing and Impoundment of Vehicles and Property (6/27/83)

A. Policy 1. It shall be general policy that impoundment occur only when absolutely necessary, and *only* after alternatives to impoundment have been exhausted.

II. B. Vehicles Involved in Moving Traffic Violations. Vehicles of individuals arrested for DWI that do not need to be impounded may be released to owner's representative, or left at the scene, at the request of the driver, if not obstructing traffic.

II. D. Vehicle Driver Arrested (vehicle handled according to their request, including leaving vehicle lawfully parked and secured if they so authorize.)

5. Portland, Oregon, Bureau of Police *General Order*, Section No. 630.60 Revision #9, April 29, 1986. (Officer may tow a vehicle when the vehicle was in the possession of a person taken into custody by a law enforcement officer and no other reasonable disposition of vehicle is available.)

6. San Francisco Police Department, General Order J-3 (8/7/84) Vehicle Tows, Holds, Inventory Forms, and Releases. (I.A.7. Arrest Tow—vehicles shall not be towed unless tow specifically requested by arrestee.)

7. Tampa, Florida Police Department Policy Statement 505—Impoundment of Vehicles. (III. Policy vehicles may be impounded in arrest situation or when operator refuses to sign a release of responsibility.)

8. Wichita, Kansas Police Department Rules and Regulations 519.00 Motor Vehicle Impounds (Officer *will* immediately impound a vehicle when a driver is arrested except officer may release vehicle to another person upon request or arrestee/owner.

9. Youngstown, Ohio City Police. (Suspect's car is searched and inventories only if suspect gives permission—search warrant required to look into suitcases, closed container or items not accessible to open view.)

Supreme Court, U.S.
FILED
OCT 25 1986
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NO. 85-889

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF COLORADO,

vs.

STEVEN LEE BERTINE.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE STATE OF COLORADO

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1986

CASE NUMBER 85-889

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

STEVEN LEE BERTINE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE STATE OF COLORADO

INTRODUCTION

The Respondent has filed a brief, as have the American Civil Liberties Union and the Colorado Criminal Defense Bar, Inc. as amici curiae. In reply Petitioner seeks to correct several erroneous claims in Respondent's brief and to show the legal and pragmatic problems inherent in the arguments of Respondent and his amici curiae.

Before replying to Respondent's specific arguments, several general observations are appropriate.

Every case cited by Respondent in support of his position that closed container searches are unreasonable was decided prior to Illinois v. Lafayette, 462 U.S. 640 (1983).[1] Several of those cases were decided prior to South Dakota v. Opperman, 428 U.S. 364 (1976). Some have been overruled since Lafayette.[2]

On the other hand, every appellate decision since Lafayette has upheld inventory searches of closed containers in automobiles. The Colorado Supreme Court's

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[1] Br. Res. 28 n.11.

[2] Although it was not noted in Respondent's brief, two cases cited in his footnote 11, State v. Potter, 648 P.2d 1162 (Kan. 1982) and State v. Morgan, 600 P.2d 155 (Kan. 1979), were specifically overruled in State v. Fortune, 689 P.2d 1196, 1203 (Kan. 1984). Additionally, Cirago v. State, 471 A.2d 320 (Md. App. 1984), implicitly overruled two other cases cited by Respondent: State v. Smith, 427 A.2d 1064 (Md. App. 1981) and Manalanson v. State, 415 A.2d 308 (Md. App. 1980).

decision in this case is the lone exception. The cases upholding searches are cited in Petitioner's brief, pages 39-43, and in the United States brief, page 18 n.7. Recently, the District of Columbia Court of Appeals upheld the inventory search of a wallet-like zippered key case found in an automobile on the basis of Lafayette. Hill v. United States, 512 A.2d 269, 277 (D.C. App., July 3, 1986).

Respondent appears to suggest either a lack of ripeness, because the Colorado Supreme Court had no authority to address the federal constitutional issue on interlocutory appeal, or a lack of a federal question, due to an adequate and independent state ground. (Br. Res. 1-4). Neither claim is justified. The Colorado Supreme Court plainly concluded that it had the authority to address the federal law question. That court was unequivocal in resting its decision upon the Fourth Amendment and no other ground: "[b]ecause we view the search here as violative of the fourth amendment protections, we need not decide whether article II, section 7 of the Colorado Constitution provides the citizens of this state with greater protections than the United States Constitution in the area of automobile inventory searches." People v. Bertine, 706 P.2d 411, 419 (Colo. 1985); Pet. Cert. 50-51. Clearly, it is not for this Court to question the Colorado Supreme Court's interpretation of Colorado judicial procedures.

Petitioner has organized Respondent's arguments under six general headings. Each is discussed separately.

I. RESPONDENT'S CLAIM THAT THE SEARCH IN THIS CASE WAS NOT A VALID INVENTORY SEARCH DIRECTLY CONTRADICTS THE FACTUAL FINDINGS OF THE TRIAL COURT AND THE RECORD.

Notwithstanding the explicit factual findings of the trial court to the contrary, Respondent in his brief claims that "[t]he facts of this case show that the initial investigative motive of the search of the backpack was later justified by a 'routine' impoundment and inventory." (Br. Res. 14, 18-19).[3] Respondent raised the same argument in the trial court. The trial court specifically rejected this allegation, and made a factual finding that the decision to impound and inventory the vehicle was done in good faith and was "not a pretext for an investigative search." (J.A. 81-82, 86-87).

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[3] In a paragraph alleging that the inventory search was a "sham" Respondent erroneously quoted the record. In its findings the trial court stated "that the vehicle was inventoried first and the backpack later. And that the inventories were done by different people." (J.A. 82). The quote, as it appears in Respondent's brief, reads like this: "[t]he trial court found that the 'inventory listing items in the backpack was done much later by someone else.' (J.A. 82)." (Br. Res. 18). Several other allegations in that paragraph (Br. Res. 18-19) are unsupported by the portions of the record cited and are contrary to the trial court's factual findings (J.A. 81-82, 86-87).

II. RESPONDENT'S RELIANCE UPON CHADWICK AND SANDERS IS MISPLACED.

Respondent argues that an inventory search of closed containers located in an automobile is permissible only if "based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant." (Br. Res. 24). This claim amounts to an evisceration of the concept of an inventory search and, in effect, asks this Court to overrule its decisions in Opperman and Lafayette.

Both United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), involved investigative searches where the police had probable cause to believe, before the search, that a container in the suspect's possession held contraband. This Court has rejected the notion that the rationale of Chadwick and Sanders bears upon inventory searches. Lafayette, 462 U.S. at 643-644; Chadwick, 433 U.S. at 10 n.5.

Respondent fails to recognize that the justification for the search in this case is the inventory exception, not the automobile exception. The mere fact that both exceptions do apply to automobiles does not mean, as Respondent seems to argue, that the automobile exception must in every instance supersede an inventory search analysis. In other words, Respondent errs in suggesting that the mere fact that the backpack in this case was found in an automobile somehow immunizes it from an inventory search of essentially the same scope as that upheld in Lafayette. Certainly nothing in Chadwick or Sanders suggests such an "automobile exception" to the inventory search doctrine.

III. RESPONDENT'S ARGUMENT THAT CLOSED CONTAINER INVENTORY SEARCHES VIOLATE THE FOURTH AMENDMENT MISAPPREHENDS THE UNDERLYING RATIONALE OF THE INVENTORY SEARCH EXCEPTION AND IS BASED UPON FALSE ASSUMPTIONS AND IMPRACTICAL SUGGESTIONS.

Respondent and the American Civil Liberties Union advance three separate theories allegedly showing that closed container inventory searches are unreasonable. Each is based upon false assumptions and impractical suggestions. In addition, they misconstrue the nature of Fourth Amendment requirements because each depends upon the "less intrusive means" analysis which was rejected in Lafayette.

A. The Consent Theory

The American Civil Liberties Union suggests that closed container inventory searches violate the Fourth Amendment absent the consent of the owner of the vehicle. (Br. ACLU 9). Obviously, if consent were a prerequisite to inventory searches the entire inventory exception to the warrant requirement would be absorbed into the consent exception. In effect, Lafayette and Opperman would be overruled.

Further, such a per se requirement is totally impractical. In many cases the owner may be incapacitated and unable to make a decision; for example, where there is an accident and the owner suffers personal injuries requiring immediate hospitalization. Occasionally the owner may be incapacitated due to intoxication, as in this case. It makes no sense to require the police to arrest an intoxicated person and then turn around and request that same person to make an intelligent, responsible decision about park and lock, release of the vehicle to a

third person, or an inventory of the contents of the vehicle. By law in Colorado, as in many other states, a police officer has an obligation to provide an allegedly drunken driver with a breath or blood test within a short time of his arrest.[4] This is for the benefit of the arrested person as well as the state.

If consent was a prerequisite to an inventory search the police officer would have to post someone with the car, drive Mr. Bertine to the nearest telephone, wait while he called several friends to see if anyone was willing to come out and pick up his car in the middle of the night, wait longer while the friend drove to the scene of the arrest, and then check out the friend's sobriety and driver's license. If the scene of the arrest was far outside of town the delay would be even greater. When coupled with the unruly, argumentative, or boisterous demeanor of many intoxicated persons, such an elaborate procedure is totally unworkable. Also, it would delay removal of the vehicle which may be a hazard or impediment to other traffic.

In many instances the owner of the vehicle will not be present at the time of impoundment. This would occur where the vehicle was moved because of a snow or flood emergency, because it was illegally parked in a handicapped space or near a fire hydrant, or because it was illegally parked on private property.

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[4] Colorado Revised Statutes (C.R.S.) §42-4-1202(3) (1973) requires that a blood alcohol test be performed upon the request of the police officer or the arrested person. The test must be performed within one hour. C.R.S., §42-2-122.1(1)(a).

Finally, the driver of a vehicle may not be the owner and therefore not have authority over its disposition or standing to consent to an inventory of its contents. For all of these reasons it would be impractical to require consent of the owner of the vehicle as a prerequisite to an inventory search.

The notion of requiring consent was rejected in Opperman. There the Court stated that the consent theory was based upon the false assumption that the inventory was exclusively for the protection of the car owner; false because the inventory also protects the police and municipality from claims of lost or stolen property and the public from vandals who might find dangerous items in the car. Id., 428 U.S. at 376 n.10. Because the consent theory is impractical and inadequate to protect all of the interests at stake, it should be rejected again by this Court.

B. The "Leave It" Or "Take It Sealed" Theory

Respondent urges the Court to adopt a different per se rule whereby all closed containers shall not be inventoried unless their contents are in plain view or are reasonably believed to be dangerous. (Br. Res. 40).[5] This proposal is based upon

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[5] Of course, under this test, the searches in both Opperman and Lafayette were unconstitutional. The contents of the glove compartment and the shoulder bag were neither in plain view nor reasonably believed to be dangerous. Respondent's test ignores the rationale of the

the assumption that closed containers can be inventoried "as a unit" either by leaving the container in the vehicle and noting it on an inventory report or by seizing the container, sealing it in a closed condition, and storing it in the police department. Obviously, closed containers may be either left in an automobile or seized, but Respondent is mistaken in concluding that either of these procedures satisfies all of the interests involved. A close examination of each procedure demonstrates this.

To illustrate the "leave it" and "take it sealed" alternatives, assume a typical scenario: Mr. A is driving to work and is involved in an intersection collision and suffers head and chest injuries. His car sustains disabling damage to the engine and steering. Mr. A is immediately removed to the hospital by ambulance attendants and the police must clear his vehicle from the intersection to permit normal traffic. In the back of Mr. A's stationwagon is a closed cardboard box containing three sophisticated remote television cameras worth three thousand dollars, a handgun, holster, and some written contracts, all items related to his employment in the private security business. Officer Smith is assigned to deal with Mr. A's vehicle and observes the cardboard box during his routine inventory. The car is about to be towed

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inventory search exception, which is grounded on the routineness of its administration, by proposing that inventory searches be subjected to standards developed to apply to searches conducted in other contexts and for other purposes.

by an attendant of City Towing to the impound lot which lies at the edge of town and which is part of a junk yard and used auto parts business.

Under Respondent's theory Officer Smith may either leave the box or seize it. First assume that because Officer Smith has no way of evaluating the contents of the box he decides to leave it unopened in the car. In this case no interests are served except for Mr. A's interest in the privacy of the contents of the box. The public is not protected from any latent danger posed by the gun. Mr. A's possessions are taken from him and placed for indefinite time somewhere where they are exposed to the risk of theft or vandalism. Further, in the event of theft, Mr. A has no means of assessing responsibility between the police, the tow company, or the impound lot.

Likewise, in the event of a claim of theft, the police have no way of protecting themselves from undeserved liability. For example, if Mr. A claims three television cameras were in the box and the police inventory form shows three cameras in the box, but only two cameras are there when Mr. A goes to claim his property, it is easy to establish that liability lies with the tow company (if the property was left in the car) or the evidence custodian. Similarly, if after retrieving his car Mr. A claims that a rare and expensive Chinese vase was taken from the cardboard box and sues the police department, the fact that the police inventory report shows that the box contained only items used in Mr. A's business may help persuade a jury that Mr. A's claim was false.

Neither inventoring nor sealing closed containers is an absolute guarantee against theft by the officer conducting the inventory. Routine inventories are substantially related to the goals of

providing an accurate accounting of property within the control or responsibility of the police in an effort to protect the owner's property interest and protect the police from false claims. The inventory procedure narrows down the list of potentially responsible persons and that in and of itself discourages theft or careless handling.

If on the other hand Officer Smith elects to take custody of the cardboard box for safekeeping many practical problems arise. First, Officer Smith must evaluate the box to see if it contains anything by picking it up, shaking it slightly, or other measures. Then he must carry the box to his patrol car, drive it to the station, and carry it to the evidence room. There he signs it over to an evidence custodian who must carry it into the evidence room, mark it, log it in the records, and carry it to a shelf or other storage space. The box remains there for days, weeks, or months depending on a wide range of factors over which the evidence custodian has no control and about which no certain predictions can be made. Eventually Mr. A comes to the police department, signs out the box, and carries it through the halls of the police department to the door.

The impracticality of this procedure is apparent. Each person who must handle, transport, and store the box has no information about latent dangers or special handling requirements of its contents. In the case of Mr. A's box neither Officer Smith nor the evidence custodian has any idea that the gun is in the box, nor do they know whether the gun is loaded, whether the safety is on or off, whether the gun is in good working order or defective, or whether other items inside the box could trigger the gun by accident as a result of jostling, shaking, or other movement. If the box contained

fungible items like meat or produce, delicate items like crystal, or volatile chemicals there would be no way of determining these special handling needs.

Under the "take and seal" option the police are in a situation identical to that in Lafayette. There the inventorying of closed containers was reasonable not only because of the dangers posed to the arrestee or other jail inmates, but also because of the danger posed to jail personnel who had to take in items, store them, and then return them to the arrestee. Id., 462 U.S. at 646. It would make no sense to expose the patrol officer and evidence custodian to risks that jail personnel are protected from.

Other practical considerations militate against the "take and seal" option. This option involves a tremendous expenditure of time and space resources. The police officer who seizes an item must leave his patrol duties on the street and come into the stationhouse for the period of time it takes to locate the evidence custodian and log in the item. This drains police resources from the place they are needed most: on the street. Likewise the evidence custodian must take time from his regular duties to handle an entirely new class of property. The evidence room at the Boulder Police Department is literally filled to overflowing with boxes containing evidence from an ever increasing number of criminal cases. If only one out of three impounded automobiles required the storage of a medium-sized closed container, such a program in Boulder County probably would consume many additional man-hours per week and a large percentage of additional storage space. Neither the "leave it" or "take it sealed" option is practical, nor does either option protect the individual and governmental interests at stake.

C. The Container-By-Container Balancing Theory

Finally, Respondent resorts to the container-by-container balancing test advocated by the Colorado Supreme Court. Under this test the reasonableness of each inventory search is determined on a post hoc basis by looking at container-specific or case-specific factors. For example, Respondent argues that container-specific factors should control in every case; i.e. no container shall be inventoried "unless its contents are in plain view or are reasonably believed to be dangerous." (Br. Res. 41). This approach ignores reality and practicality. Most closed containers,[6] unless they are a gun case or box labeled "dynamite," by their very nature do not disclose their contents. In this case seven hundred dollars cash was kept inside of a tin can. (R. 65).

The container-specific analysis was rejected in Lafayette where the Court stated:

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[6] To the virtual exclusion of any other term, the word "luggage" appears in the Respondent's brief approximately forty-five times and in the American Civil Liberties Union's brief approximately forty-four times. The cases cited in the briefs demonstrate that a wide variety of closed containers are commonly encountered within automobiles. See, e.g. United States v. Trullo, No. 85-1708 (1st Cir. May 14, 1986) (false Pennzoil can); Wooldridge v. State, 696 S.W.2d 252, 254-255 (Tex. Ct. App. 1985) (8-track case); People v. Gonzalez, 465 N.E.2d 823, 824-825 (1984) (paper bag).

> "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns. * * * [I]t would be unreasonable to expect police officers in the every day course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."

Id., 462 U.S. at 646, 648.

The American Civil Liberties Union's list of case-specific factors is naive and impractical. First, it suggests that the inventory was unnecessary and therefore unreasonable because Mr. Bertine's car could have been towed to the nearby parking lot of a small private shopping center. (Br. ACLU 41). Conveniently, the American Civil Liberties Union overlooks the problem of who will pay for this towing operation or how the towing company will be assured of payment by the owner. The police have no money to pay for it, and Mr. Bertine certainly would not feel obligated to the towing company after simply retrieving his car. In practical terms, the towing company would have no means of getting paid except for a civil lawsuit. Further, the parking lot referred to was private property and the police had no right to put automobiles there for any length of time. Such a procedure does nothing to protect the individual or governmental interests at stake.

Next the American Civil Liberties Union claims that the reasonableness of the inventory should turn upon the security afforded by the impoundment

facility or the length of time the arrestee is likely to spend in police custody. (Br. ACLU 36 n.12, 38 n.13). The security provided by impound lots varies widely. Just within Boulder County there are many differing facilities whose characteristics depend largely on the size of the community. Surely this is true around the nation. No impound lot is totally secure.

Likewise, the length of time the police have custody of an automobile varies greatly. In some cases it may take days to locate the owner. How long an arrestee remains in custody is not known until he appears before a judge or other bonding magistrate. Whether he is released on bond will depend upon his own financial resources as well as his ties to the community, his criminal history, the circumstances of his arrest, and how these things are viewed by the bonding magistrate. The patrol officer knows nothing about these factors. It is not uncommon for people arrested for DUI to spend thirty to ninety days in jail awaiting a trial or plea bargain.

The container-by-container balancing analysis is impractical because each situation presents too many variables, the relative significance of which is made known to the police officer for certain only after a post hoc adjudication. This puts the police officer in the untenable position of having to guess about how to do his job.

Further, a container-by-container analysis fundamentally contradicts the rationale of the inventory search exception. As stated by the United States in its brief, "[t]he permissibility of a routine inventory search does not turn on whether the facts of a particular case support one or more of the justifications underlying the adoption of an inventory

procedure -- indeed, the practice would not be 'routine' if it did." (Br. U.S. 16).

Contrary to Respondent's claim, there is no need for a particularized inquiry of reasonableness to justify each inventory. Neither the reasonableness of an individual's expections of privacy in a particular container nor the availability of less intrusive alternatives or the presence of exigent circumstances in a particular case affects the validity of a routine inventory search. Inventory searches are justified by the overall reasonableness of routine inventory procedures.

When reduced to their essence, the two per se rules and the container-by-container analysis amount to, in one form or another, a "less intrusive means" test. Respondent has described three proposals that he believes are "more reasonable" than the alternative of inventorying closed containers. A close examination of these three alternatives shows that in fact they are inadequate to deal with all of the governmental interests involved or are impractical in light of the realities of handling, transporting, and storing closed containers. Instead of being "more reasonable" alternatives, they are in fact less reasonable.

IV. RESPONDENT'S ASSERTION THAT LAFAYETTE DOES NOT APPLY TO AUTOMOBILE INVENTORY SEARCHES IGNORES THE FACTS.

Respondent claims that the governmental interests at stake in an automobile inventory search are much different than, and much less than, the governmental interests in a booking desk inventory. (Br. Res. 34-37). In support Respondent simply asserts, without more, that there is a more compelling need to

search for weapons and other dangerous items at the booking desk than during a vehicle impoundment. In his dissent to the opinion below, Justice Rovira succinctly answered that assertion:

> Although this reasoning is sound when searching the actual person of an arrestee, it makes absolutely no sense when applied to searches of containers within the detainee's possession. The police can just as easily note, seal, and store a backpack found on the person of an arrestee as it can a knapsack found in the back seat of an automobile. In both cases, once the container is removed from the reach of the arrestee, the threat of weapons or contraband being introduced to the jailhouse no longer exists. * * * Yet, Lafayette declined to impose on law enforcement agencies such a duty to seal and store. (Pet. Cert. 71-72).

As explained in Petitioner's opening brief, the governmental interests in safekeeping property, being free from unjustified liability, and protecting the public are substantially the same whether the inventory search is conducted on the street or at the booking desk. This is particularly true where containers are brought to the stationhouse for safekeeping.

V. RESPONDENT'S ARGUMENT THAT THE BOULDER POLICE DEPARTMENT REGULATIONS PUT UNLAWFUL DISCRETION IN THE HANDS OF POLICE OFFICERS MISCONSTRUES THE REASONING OF OPPERMAN.

Respondent erroneously claims that in Opperman "the decision to inventory was non-discretionary. All abandoned cars were impounded and inventoried." (Br. Res. 17-18). In Opperman the defendant's car was towed and impounded after it was illegally parked on a downtown street and two parking violation citations had been placed on the windshield. Part of the citation warned: "Vehicles in violation of any parking ordinance may be towed from the area." Id., 428 U.S. at 365. (Emphasis added.) Clearly, the Vermillion Police Department did not have a rigid rule requiring impoundment of every illegally parked vehicle. The thrust of the reasoning in Opperman, as stated by Justice Powell in his concurring opinion, was that once the decision to impound a vehicle was made the procedure from that point on was standardized. Id., 428 U.S. at 380 n.6. Nothing in Opperman leads to the conclusion that reasonable discretion in the decision to impound invalidates the subsequent inventory procedure.

Indeed, a tenet of constitutional law that predicated the reasonableness of an inventory procedure on a rigid rule requiring impoundment whenever there was legal justification would be overbroad. It would lead to the seizure of vehicles in many situations where a lesser response was entirely appropriate. More vehicles would be impounded and many more citizens' privacy would be disturbed, all for no reason.

Conversely, a rigid policy requiring park and lock or release of the vehicle to a third party would be impractical. A sober, responsible third party is not

always available. Leaving a vehicle where it is found is not an option if it is illegally parked or blocking traffic.

The availability of discretion in the decision to impound does not implicate the wide range of concerns about overzealous police activity in the execution of investigative functions. Such discretion does not immunize the police from judicial scrutiny to insure that the inventory procedure is not being used to conceal an investigatory motive. This case is a perfect illustration of that.

VI. RESPONDENT'S PREDICTION THAT A "PARADE OF HORRIBLES" WOULD FLOW FROM REVERSAL OF THE COLORADO SUPREME COURT IS UNJUSTIFIED.

The American Civil Liberties Union predicts that closed container inventory searches will lead to random searches of "[c]ars parked near governmental buildings or, indeed, shopping centers; houses located near defense installations" and "[w]hy not luggage in any vehicle parked in any public place?" (Br. ACLU 33, 37). This vision is boundless: they foresee a world where even homes and hotel rooms are invaded under the guise of "inventory" searches. (Br. Res. 40; Br. ACLU 13). No such concerns are implicated by upholding searches of closed containers within the narrow context of police inventories conducted pursuant to standard procedures.

Respondent and the American Civil Liberties Union also claim that inventory searches are fraught with potential for "pretext" searches. However, the possibility of subterfuge exists whether or not closed containers are inventoried and, further, exists in connection with every exception to the warrant requirement. The possibility of abuse does not negate the reasonableness of such searches and does not require rejection of

closed container inventory searches. The solution instead is to suppress searches that are the product of such abuse.

Contrary to Respondent's suggestion, the boundaries of inventory searches are not limitless. Courts have been and continue to be fully capable of separating legitimate and illegitimate searches. Definite parameters of lawful inventory searches have been identified in the case law already. These include: (1) that there was a bona fide reason for the police to have contact with the automobile, (2) that there was a lawful basis to impound the automobile, (3) that there was an established, routine procedure for inventory searches of impounded automobiles, (4) that the established procedures were followed by the inventorying officer, (5) that only areas or containers that could reasonably be used for the storage of valuable or dangerous items were searched, and (6) that the inventory search was not used as a subterfuge to conceal an investigatory motive.[7]

Courts can apply these criteria when there is a claim of subterfuge or pretext. The trial court applied similar criteria to the evidence in this case and held as a matter of fact that the search was conducted in good faith and was not a pretext. (J.A. 81-82, 86-87). By this

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[7] Several of these six criteria are explicitly mentioned in Opperman and Lafayette. Many subsequent cases have articulated these criteria, but two particularly thorough discussions are found in Hill v. United States, 512 A.2d 269, 273 (D.C. App. 1986) and Ciriago v. State, 471 A.2d 320, 323-324 (Md. App. 1984).

process courts will continue to protect the constitutional rights of all citizens.[8]

Finally, Respondent and the American Civil Liberties Union argue that a rule permitting inventory searches of closed containers in automobiles will swallow the distinctions hammered out in cases like United States v. Ross, 456 U.S. 798 (1982), New York v. Belton, 453 U.S. 454 (1981), and United States v. Chadwick, 433 U.S. 1 (1977). In many situations a vehicle inventory takes place unrelated to any arrest or criminal investigation, as in Opperman. Inventory searches can be distinguished readily from investigative searches, like those in Ross and Chadwick, or protective searches, like that in Belton, by resort to the criteria discussed above. To date courts have had no difficulty making these distinctions, nor is there any evidence in the case law that all exceptions to the warrant requirement will be subsumed under the heading of inventory searches.

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[8] Many courts have used their supervisory powers responsibly and stricken down purported inventory searches that in fact concealed an investigative motive. Respondent cites several of these in his brief. (Br. Res. 19 n.8). See also, People v. Rutovic, 566 P.2d 705 (Colo. 1977); People v. Nogel, 484 N.E.2d 512 (Ill. App. 1985).

Respectfully submitted,

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OCTOBER 1986

EDITOR'S NOTE

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Supreme Court, U.S.
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CLERK

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NO. 85-889

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF COLORADO,

vs.

STEVEN LEE BERTINE.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE STATE OF COLORADO

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1986

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THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

STEVEN LEE BERTINE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE STATE OF COLORADO

INTRODUCTION

Respondent has filed a brief, as have the American Civil Liberties Union and the Colorado Criminal Defense Bar, Inc., as amici curiae. In reply Petitioner seeks to correct several erroneous claims in Respondent's brief and to show the legal and pragmatic problems inherent in the arguments of Respondent and his amici curiae.

Before replying to Respondent's specific arguments, several general observations are appropriate.

Every case cited by Respondent in support of his position that closed container searches are unreasonable was decided prior to Illinois v.

Lafayette, 462 U.S. 640 (1983).[1] Several of those cases were decided prior to South Dakota v. Opperman, 428 U.S. 364 (1976). Some have been overruled since Lafayette.[2]

On the other hand, every appellate decision since Lafayette has upheld inventory searches of closed containers in automobiles. The Colorado Supreme Court's decision in this case is the lone

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[1] Br. Res. 28 n.11.

[2] Although it was not noted in Respondent's brief, two cases cited in his footnote 11, State v. Potter, 648 P.2d 1162 (Kan. 1982) and State v. Morgan, 600 P.2d 155 (Kan. 1979), were specifically overruled in State v. Fortune, 689 P.2d 1196, 1203 (Kan. 1984). Additionally, Ciriago v. State, 471 A.2d 320 (Md. App. 1984), implicitly overruled two other cases cited by Respondent: State v. Smith, 427 A.2d 1064 (Md. App. 1981) and Manalanson v. State, 415 A.2d 308 (Md. App. 1980).

exception. The cases upholding searches are cited in Petitioner's brief, pages 39-43, and in the United States brief, page 18 n.7. Recently, the District of Columbia Court of Appeals upheld the inventory search of a wallet-like zippered key case found in an automobile on the basis of Lafayette. Hill v. United States, 512 A.2d 269, 277 (D.C. App., July 3, 1986).

Respondent appears to suggest either a lack of ripeness, because the Colorado Supreme Court had no authority to address the federal constitutional issue on interlocutory appeal, or a lack of a federal question, due to an adequate and independent state ground. (Br. Res. 1-4). Neither claim is justified. The Colorado Supreme Court plainly concluded that it had the authority to address the federal law question. That court was unequivocal in resting its decision upon the Fourth

Amendment and no other ground: "[b]ecause we view the search here as a violative of the fourth amendment protections, we need not decide whether article II, section 7 of the Colorado Constitution provides the citizens of this state with greater protections than the United States Constitution in the area of automobile inventory searches." People v. Bertine, 706 P.2d 411, 419 (Colo. 1985); Pet. Cert. 50-51. Clearly, it is not for this Court to question the Colorado Supreme Court's interpretation of Colorado judicial procedures.

Petitioner has organized Respondent's arguments under six general headings. Each is discussed separately.

I. RESPONDENT'S CLAIM THAT THE SEARCH IN THIS CASE WAS NOT A VALID INVENTORY SEARCH DIRECTLY CONTRADICTS THE FACTUAL FINDINGS OF THE TRIAL COURT AND THE RECORD.

Notwithstanding the explicit factual findings of the trial court to the contrary, Respondent in his brief claims that "[t]he facts of this case show that the initial investigative motive of the search of the backpack was later justified by a 'routine' impoundment and inventory." (Br. Res. 14, 18-19).[3] Respondent raised

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[3] In a paragraph alleging that the inventory search was a "sham" Respondent erroneously quoted the record. In its findings the trial court stated "that the vehicle was inventoried first and the backpack later. And that the inventories were done by different people." (J.A. 82). The quote, as it appears in Respondent's brief, reads like this: "[t]he trial court found that the 'inventory listing items in the backpack was done much later by someone else.' (J.A. 82)." (Br. Res. 18). Several other allegations in that paragraph (Br. Res. 18-19) are unsupported by the portions of the record cited and are contrary to the trial court's factual findings (J.A. 81-82, 86-87).

the same argument in the trial court. The trial court specifically rejected this allegation, and made a factual finding that the decision to impound and inventory the vehicle was done in good faith and was "not a pretext for an investigative search." (J.A. 81-82, 86-87).

II. RESPONDENT'S RELIANCE UPON CHADWICK AND SANDERS IS MISPLACED.

Respondent argues that an inventory search of closed containers located in an automobile is permissible only if "based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant." (Br. Res. 24). This claim amounts to an evisceration of the concept of an inventory search and, in effect, asks this Court to overrule its decision in Opperman and Lafayette.

Both United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), involved investigative searches where the police had probable cause to believe, before the search, that a container in the suspect's possession held contraband. This Court has rejected the notion that the rationale of Chadwick and Sanders bears upon inventory searches. Lafayette, 462 U.S. at 643-644; Chadwick, 433 U.S. at 10 n.5.

Respondent fails to recognize that the justification for the search in this case is the inventory exception, not the automobile exception. The mere fact that both exceptions do apply to automobiles does not mean, as Respondent seems to argue, that the automobile exception must in every instance supersede an inventory search analysis. In other words, Respondent errs in suggesting that the

mere fact that the backpack in this case was found in an automobile somehow immunizes it from an inventory search of essentially the same scope as that upheld in Lafayette. Certainly nothing in Chadwick or Sanders suggests such an "automobile exception" to the inventory search doctrine.

III. RESPONDENT'S ARGUMENT THAT CLOSED CONTAINTER INVENTORY SEARCHES VIOLATE THE FOURTH AMENDMENT MISAPPREHENDS THE UNDERLYING RATIONALE OF THE INVENTORY SEARCH EXCEPTION AND IS BASED UPON FALSE ASSUMPTIONS AND IMPRACTICAL SUGGESTIONS.

Respondent and the American Civil Liberties Union advance three separate theories allegedly showing that closed container inventory searches are unreasonable. Each is based upon false assumptions and impractical suggestions. In addition, they misconstrue the nature of Fourth Amendment requirements because each depends upon the "less intrusive means" analysis which was rejected in Lafayette.

A. The Consent Theory

The American Civil Liberties Union suggests that closed container inventory searches violate the Fourth Amendment absent the consent of the owner of the vehicle. (Br. ACLU 9). Obviously, if consent were a prerequisite to inventory searches the entire inventory exception to the warrant requirement would be absorbed into the consent exception. In effect, Lafayette and Opperman would be overruled.

Further, such a per se requirement is totally impractical. In many cases the owner may be incapacitated and unable to make a decision; for example, where there is an accident and the owner suffers injuries requiring immediate hospitalization. Occasionally the owner may be incapacitated due to intoxication, as in this case. It makes no sense to require the police to arrest an

intoxicated person and then turn around and request that same person to make an intelligent, responsible decision about park and lock, release of the vehicle to a third person, or an inventory of the contents of the vehicle. By law in Colorado, as in many other states, a police officer has an obligation to provide an allegedly drunken driver with a breath or blood test within a short time of his arrest.[4] This is for the benefit of the arrested person as well as the state.

If consent was a prerequisite to an inventory search the police officer would have to post someone with the car, drive

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[4] Colorado Revised Statutes (C.R.S.) §42-4-1202(3) (1973) requires that a blood alcohol test be performed upon the request of the police officer or the arrested person. The test must be performed within one hour. C.R.S., §42-2-122.1(1)(a).

Mr. Bertine to the nearest telephone, wait while he called several friends to see if anyone was willing to come out and pick up his car in the middle of the night, wait longer while the friend drove to the scene of the arrest, and then check out the friend's sobriety and driver's license. If the scene of the arrest was far outside of town the delay would be even greater. When coupled with the unruly, argumentative or boisterous demeanor of many intoxicated persons, such an elaborate procedure is totally unworkable. Also, it would delay removal of the vehicle which may be a hazard or impediment to other traffic.

In many instances the owner of the vehicle will not be present at the time of impoundment. This would occur where the vehicle was moved because of a snow or flood emergency, because it was illegally parked in a handicapped space or near a

fire hydrant, or because it was illegally parked on private property.

Finally, the driver of a vehicle may not be the owner and therefore not have authority over its disposition or standing to consent to an inventory of its contents. For all of these reasons it would be impractical to require consent of the owner of the vehicle as a prerequisite to an inventory search.

The notion of requiring consent was rejected in Opperman. There the Court stated that the consent theory was based upon the false assumption that the inventory was exclusively for the protection of the car owner; false because the inventory also protects the police and municipality from claims of lost or stolen property and the public from vandals who might find dangerous items in the car. Id., 428 U.S. at 376 n.10. Because the

consent theory is impractical and inadequate to protect all of the interests at stake, it should be rejected again by this Court.

B. The "Leave It" Or "Take It Sealed" Theory

Respondent urges the Court to adopt a different per se rule whereby all closed containers shall not be inventoried unless their contents are in plain view or are reasonably believed to be dangerous. (Br. Res. 40).[5] This proposal is based upon the assumption that closed containers can

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[5] Of course, under this test, the searches in both Opperman and Lafayette were unconstitutional. The contents of the glove compartment and the shoulder bag were neither in plain view nor reasonably believed to be dangerous. Respondent's test ignores the rationale of the inventory search exception, which is grounded on the routineness of its administration, by proposing that inventory searches be subjected to standards developed to apply to searches conducted in other contexts and for other purposes.

be inventoried "as a unit" either by leaving the container in the vehicle and noting it on an inventory report or by seizing the container, sealing it in a closed condition, and storing it in the police department. Obviously, closed containers may be left in an automobile or seized, but Respondent is mistaken in concluding that either of these procedures satisifies all of the interests involved. A close examination of each procedure demonstrates this.

To illustrate the "leave it" and "take it sealed" alternatives, assume a typical scenario: Mr. A is driving to work and is involved in an intersection collision and suffers head and chest injuries. His car sustains disabling damage to the engine and steering. Mr. A is immediately removed to the hospital by ambulance attendants and the police must clear his vehicle from the intersection to

permit normal traffic. In the back of Mr. A's stationwagon is a closed cardboard box containing three sophisticated remote television cameras worth three thousand dollars, a handgun, holster, and some written contracts, all items related to his employment in the private security business. Officer Smith is assigned to deal with Mr. A's vehicle and observes the cardboard box during his routine inventory. The car is about to be towed by an attendant of City Towing to the impound lot which lies at the edge of town and which is part of a junk yard and used auto parts business.

Under Respondent's theory Officer Smith may either leave the box or seize it. First assume that because Officer Smith has no way of evaluating the contents of the box he decides to leave it unopened in the car. In this case no interests are served except for Mr. A's

interest in the privacy of the contents of the box. The public is not protected from any latent danger posed by the gun. Mr. A's possessions are taken from him and placed for indefinite time somewhere where they are exposed to the risk of theft or vandalism. Further, in the event of theft, Mr. A has no means of assessing responsibility between the police, the tow company, or the impound lot.

Likewise, in the event of a claim of theft, the police have no way of protecting themselves from undeserved liability. For example, if Mr. A claims three television cameras were in the box and the police inventory form shows three cameras in the box, but only two cameras are there when Mr. A goes to claim his property, it is easy to establish that liability lies with the tow company (if the property was left in the car) or the evidence custodian. Similarly, if after

retrieving his car Mr. A claims that a rare and expensive Chinese vase was taken from the cardboard box and sues the police department, a jury may be persuaded that Mr. A's claim was false by the fact that the police inventory report shows that the box contained only items used in Mr. A's business.

Neither sealing nor inventorying closed containers is an absolute guarantee against theft by the officer conducting the inventory. Routine inventories are substantially related to the goals of providing an accurate accounting of property within the control or responsibility of the police, protecting the owner's property interest, and protecting the police from false claims. The inventory procedure narrows down the list of potentially responsible persons and that in and of itself discourages theft or careless handling.

If Officer Smith elects to take custody of the cardboard box for safekeeping many practical problems arise. First, Officer Smith must evaluate the box to see if it contains anything by picking it up, shaking it slightly, or other measures. Then he must carry the box to his patrol car, drive it to the station, and carry it to the evidence room. There he signs it over to an evidence custodian who must carry it into the evidence room, mark it, log it in the records, and carry it to a shelf or other storage space. The box will remain there for days, weeks, or months depending on a wide range of factors over which the evidence custodian has no control and about which no certain predictions can be made. Eventually Mr. A comes to the police department, signs out the box, and carries it through the halls of the station to the door.

The impracticality of this procedure is apparent. Each person who must handle, transport, and store the box has no information about the latent dangers or special handling requirements of its contents. In the case of Mr. A's box neither Officer Smith nor the evidence custodian has any idea that the gun is in the box, nor do they know whether the gun is loaded, whether the safety is on or off, whether the gun is in good working order or defective, or whether other items inside the box could trigger the gun by accident as a result of jostling or shaking. If the box contained fungible items like meat or produce, delicate items like crystal, or volatile chemicals there would be no way of determining these special handling needs.

Under the "take and seal" option the police are in a situation identical to that in Lafayette. There the inventorying

of closed containers was reasonable not only because of the dangers posed to the arrestee or other jail inmates, but also because of the danger posed to jail personnel who had to take in items, store them, and then return them to the arrestee. Id., 462 U.S. at 646. It would make no sense to expose the patrol officer and evidence custodian to risks that jail personnel are protected from.

Other practical considerations militate against the "take and seal" option. This option involves a tremendous expenditure of time and space resources. The police officer who seizes an item must leave his duties on the street and come into the stationhouse for the period of time it takes to locate the evidence custodian and log in the item. This drains police resources from the place they are needed most: on the street. Likewise the evidence custodian must take

time from his regular duties to handle an entirely new class of property. The evidence room at the Boulder Police Department is literally filled to overflowing with boxes containing evidence from an ever increasing number of criminal cases. If only one out of three impounded automobiles required the storage of a medium-sized closed container, such a program in Boulder County probably would consume many additional man-hours per week and a large percentage of additional storage space. Neither the "leave it" or "take it sealed" option is practical, nor does either option protect the individual and governmental interests at stake.

C. The Container-By-Container Balancing Theory

Finally, Respondent resorts to the container-by-container balancing test advocated by the Colorado Supreme Court. Under this test the reasonableness of each inventory search is determined on a post

lcc basis by looking at container-specific or case-specific factors. For example, Respondent argues that container-specific factors should control in every case; i.e. no container shall be inventoried "unless its contents are in plain view or are reasonably believed to be dangerous." (Br. Res. 41). This approach ignores reality and practicality. Most closed containers,[6] unless they are a gun case or box labeled "dynamite," by their very

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[6] To the virtual exclusion of any other term, the word "luggage" appears in the Respondent's brief approximately forty-five times and in the American Civil Liberties Union's brief approximately forty-four times. The cases cited in the briefs demonstrate that a wide variety of closed containers are commonly encountered within automobiles. See, e.g. United States v. Trullo, No. 85-1708 (1st Cir. May 14, 1986) (false Pennzoil can); Wooldridge v. State, 696 S.W.2d 252, 254-255 (Tex. Ct. App. 1985) (8-track case); People v. Gonzalez, 465 N.E.2d 823, 824-825 (N.Y. 1984) (paper bag).

nature do not disclose their contents. In this case seven hundred dollars cash was kept inside of a tin can. (R. 65).

The container-specific analysis was rejected in Lafayette where the Court stated:

> "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises
>
> independent of a particular officer's subjective concerns. * * * [I]t would be unreasonable to expect police officers in the every day course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."

Id., at 462 U.S. at 646, 648.

The American Civil Liberties Union's list of case-specific factors is naive and impractical. First, it suggests that the inventory was unnecessary and therefore unreasonable because Mr. Bertine's car

could have been towed to the nearby parking lot of a small private shopping center. (Br. ACLU 41). Conveniently, the American Civil Liberties Union overlooks the problem of who will pay for this towing operation or how the towing company will be assured of payment by the owner. The police have no money to pay for it, and Mr. Bertine certainly would not feel obligated to the towing company after simply retrieving his car. In practical terms the towing company would have no means of getting paid except for a civil law suit. Further, the parking lot referred to was private property and the police had no right to put automobiles there for any length of time. Such a procedure does nothing to protect the individual or governmental interests at stake.

Next the American Civil Liberties Union claims that the reasonableness of

the inventory should turn upon the security afforded by the impoundment facility or the length of time the arrestee is likely to spend in police custody. (Br. ACLU 36 n.12, 38 n.13). The security provided by impound lots varies widely. Just within Boulder County there are many differing facilities whose characteristics depend largely on the size of the community. Surely this is true around the nation. No impound lot is totally secure.

Likewise, the length of time the police have custody of an automobile varies greatly. In some cases it may take days to locate the owner. How long an arrestee remains in custody is not known until he appears before a judge or other bonding magistrate. Whether he is released on bond will depend upon his own financial resources as well as his ties to the community, his criminal history, the

circumstances of his arrest, and how these things are viewed by the bonding magistrate. The patrol officer knows nothing about these factors. It is not uncommon for people arrested for DUI to spend thirty to ninety days in jail awaiting a trial or plea bargain.

The container-by-container balancing analysis is impractical because each situation presents too many variables, the relative significance of which is made known to the police officer for certain only after a post hoc adjudication. This puts the police officer in the untenable position of having to guess about how to do his job.

Further, a container-by-container analysis fundamentally contradicts the rationale of the inventory search exception. As stated by the United States in its brief, "[t]he permissibility of a

routine inventory search does not turn on whether the facts of a particular case support one or more of the justifications underlying the adoption of an inventory procedure -- indeed, the practice would not be 'routine' if it did." (Pr. U.S. 16).

Contrary to Respondent's claim, there is no need for a particularized inquiry of reasonableness to justify each inventory. Neither the reasonableness of an individual's expectations of privacy in a particular container nor the availability of less intrusive alternatives or the presence of exigent circumstances in a particular case affects the validity of a routine inventory search. Inventory searches are justified by the overall reasonableness of routine inventory procedures.

When reduced to their essence, the two per se rules and the container-by-container analysis amount to, in one form or another, a "less intrusive means" test. Respondent has described three proposals that he believes are "more reasonable" than the alternative of inventorying closed containers. A close examination of these three alternatives shows that in fact they are inadequate to deal with all of the governmental interests involved or are impractical in light of the realities of handling, transporting, and storing closed containers. Instead of being "more reasonable" alternatives, they are in fact less reasonable.

IV. RESPONDENT'S ASSERTION THAT LAFAYETTE DOES NOT APPLY TO AUTOMOBILE INVENTORY SEARCHES IGNORES THE FACTS.

Respondent claims that the governmental interests at stake in an automobile inventory search are much different than, and much less than, the

governmental interests in a booking desk inventory. (Br. Res. 34-37). In support Respondent simply asserts, without more, that there is a more compelling need to search for weapons and other dangerous items at the booking desk than during a vehicle impoundment. In his dissent to the opinion below, Justice Rovira succinctly answered that assertion:

> Although this reasoning is sound when searching the actual person of an arrestee, it makes absolutely no sense when applied to searches of containers within the detainee's possession. The police can just as easily note, seal, and store a backpack found on the person of an arrestee as it can a knapsack found in the back seat of an automobile. In both cases, once the container is removed from the reach of the arrestee, the threat of weapons or contraband being introduced to the jailhouse no longer exists. * * * Yet, Lafayette declined to impose on law enforcement agencies such a duty to seal and store. (Pet. Cert. 71-72).

As explained in Petitioner's opening brief, the governmental interests in safekeeping property, being free from

unjustified liability, and protecting the public are substantially the same whether the inventory search is conducted on the street or at the booking desk. This is particularly true where containers are brought to the stationhouse for safekeeping.

V. RESPONDENT'S ARGUMENT THAT THE BOULDER POLICE DEPARTMENT REGULATIONS PUT UNLAWFUL DISCRETION IN THE HANDS OF POLICE OFFICERS MISCONSTRUES THE REASONING OF OPPERMAN.

Respondent erroneously claims that in Opperman "the decision to inventory was non-discretionary. All abandoned cars were impounded and inventoried." (Br. Res. 17-18). In Opperman the defendant's car was towed and impounded after it was illegally parked on a downtown street and two parking violation citations had been placed on the windshield. Part of the citation warned: "Vehicles in violation of any parking ordinance may be towed from the area." Id., 428 U.S. at 365.

(Emphasis added.) Clearly, the Vermillion Police Department did not have a rigid rule requiring impoundment of every illegally parked vehicle. The thrust of the reasoning in Opperman, as stated by Justice Powell in his concurring opinion, was that once the decision to impound a vehicle was made the procedure from that point on was standardized. Id., 428 U.S. at 380 n.6. Nothing in Opperman leads to the conclusion that reasonable discretion in the decision to impound invalidates the subsequent inventory procedure.

Indeed, a tenet of constitutional law that predicated the reasonableness of an inventory procedure on a rigid rule requiring impoundment whenever there was legal justification would be overbroad. It would lead to the seizure of vehicles in many situations where a lesser response was entirely appropriate. More vehicles would be impounded and many more citizens'

privacy would be disturbed, all for no reason.

Conversely, a rigid policy requiring park and lock or release of the vehicle to a third party would be impractical. A sober, responsible third party is not always available. Leaving a vehicle where it is found is not an option if it is illegally parked or blocking traffic.

The availability of discretion in the decision to impound does not implicate the wide range of concerns about overzealous police activity in the execution of investigative functions. Such discretion does not immunize the police from judicial scrutiny to insure that the inventory procedure is not being used to conceal an investigatory motive. This case is a perfect illustration of that.

VI. RESPONDENT'S PREDICTION THAT A "PARADE OF HORRIBLES" WOULD FLOW FROM REVERSAL OF THE COLORADO SUPREME COURT IS UNJUSTIFIED.

The American Civil Liberties Union predicts that closed container inventory searches will lead to random searches of "[c]ars parked near governmental buildings or, indeed, shopping centers; houses located near defense installations" and "[w]hy not luggage in any vehicle parked in any public place?" (Br. ACLU 33, 37). This vision is boundless: they foresee a world where even homes and hotel rooms are invaded under the guise of "inventory" searches. (Br. Res. 40; br. ACLU 13). No such concerns are implicated by upholding searches of closed containers within the narrow context of police inventories conducted pursuant to standard procedures.

Respondent and the American Civil Liberties Union also claim that inventory searches are fraught with potential for "pretext" searches. However, the

possibility of subterfuge exists whether or not closed containers are inventoried and, further, exists in connection with every exception of the warrant requirement. The possibility of abuse does not negate the reasonableness of such searches and does not require rejection of closed container inventory searches. Instead, the solution is to suppress searches that are the product of such abuse.

Contrary to Respondent's suggestion, the boundaries of inventory searches are not limitless. Courts have been and continue to be fully capable of separating legitimate and illegitimate searches. Definite parameters of lawful inventory searches have been identified in the case law already. These include: (1) that there was a bona fide reason for the police to have contact with the automobile, (2) that there was a lawful

basis to impound the automobile, (3) that there was an established, routine procedure for inventory searches of impounded automobiles, (4) that the established procedures were followed by the inventorying officer, (5) that only areas or containers that could reasonably be used for the storage of valuable or dangerous items were searched, and (6) that the inventory search was not used as a subterfuge to conceal an investigatory motive.[7]

Courts can apply these criteria when there is a claim of subterfuge or pretext. The trial court applied similar criteria

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[7] Several of these six criteria are explicitly mentioned in Opperman and Lafayette. Many subsequent cases have articulated these criteria, but two particularly thorough discussions are found in Hill v. United States, 512 A.2d 269, 273 (D.C. App. 1986) and Ciriago v. State, 471 A.2d 320, 323-324 (Md. App. 1984).

to the evidence in this case and hold as a matter of fact that the search was conducted in good faith and was not a pretext. (J.A. 81-82, 86-87). By this process courts will continue to protect the constitutional rights of all citizens.[8]

Finally, Respondent and the American Civil Liberties Union argue that a rule permitting inventory searches of closed containers in automobiles will swallow the distinctions hammered out in cases like United States v. Ross, 456 U.S. 798 (1982), New York v. Belton, 453 U.S. 454

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[8] Many courts have used their supervisory powers responsibly and stricken down purported inventory searches that in fact concealed an investigative motive. Respondent cites several of these in his brief. (Br. Res. 19 n.8). See also, People v. Rutovic, 566 P.2d 705 (Colo. 1977); People v. Nogel, 484 N.E.2d 512 (Ill. App. 1985).

(1981), and United States v. Chadwick, 433 U.S. 1 (1977). In many situations a vehicle inventory takes place unrelated to any arrest or criminal investigation, as in Opperman. Inventory searches can be distinguished readily from investigative searches, like those in Ross and Chadwick, or protective searches, like that in Belton, by resort to the criteria discussed above. To date courts have had no difficulty making these distinctions, nor is there any evidence in the case law that all exceptions to the warrant requirement will be subsumed under the heading of inventory searches.

Respectfully submitted,

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No. 85-889

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF COLORADO, PETITIONER

v.

STEVEN LEE BERTINE

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits law enforcement officers, in the course of lawfully impounding a motor vehicle, to inventory the contents of containers found in the interior of the vehicle.

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INTEREST OF THE UNITED STATES

This case presents an important and recurring question under the Fourth Amendment concerning the permissible scope of an inventory search by law enforcement officers of the contents of a lawfully impounded motor vehicle. The Colorado Supreme Court held that inventory searches may not, consistent with the Fourth Amendment, extend to the contents of containers found inside a motor vehicle. Although this case concerns a state prosecution, federal law enforcement officers are authorized to conduct inven-

tory searches under certain circumstances. In addition, federal prosecutions often rely on evidence incidentally obtained by state and local law enforcement officers in the course of their own inventory searches. Accordingly, the issues presented by this case are of substantial interest to federal law enforcement officers and prosecutors.

STATEMENT

Petitioner, the State of Colorado, charged respondent with unlawful possession of cocaine and methaqualone, in violation of Colo. Rev. Stat. § 18-18-105 (Supp. 1985), and with driving while under the influence of alcohol, in violation of Colo. Rev. Stat. § 42-4-1202(1)(a) (1984). Complaint 1-2. Local law enforcement officers discovered the methaqualone and cocaine, along with cocaine paraphernalia, during an inventory of the contents of several closed containers located in respondent's panel truck. The inventory of the truck took place following respondent's arrest for driving while under the influence of alcohol (Pet. App. 28-29). Respondent moved to suppress the methaqualone, cocaine, and cocaine paraphernalia, and the trial court granted the motion (J.A. 79-88). On the State's appeal, the Colorado Supreme Court affirmed the suppression ruling (Pet. App. 25-51).

1. The evidence at the suppression hearing showed that on February 10, 1984, at approximately 12:50 a.m., Officer Julius Toporek of the Boulder Police Department observed respondent's truck weaving in traffic and speeding (Pet. App. 26). Officer Toporek stopped the truck and approached respondent. In speaking with respondent, Officer Toporek noticed that his breath had a strong odor of alcohol, his

"eyes were watery and glassy," and his "speech was slurred and somewhat dragged out" (*id.* at 27). Officer Toporek then asked respondent to perform a series of roadside sobriety tests (*ibid.*). Based on the results of those tests, Officer Toporek concluded that respondent was intoxicated, and he arrested respondent for driving while under the influence of alcohol (*id.* at 27-28).

Officer Toporek then asked Officer Paul Reichenback, who had arrived just prior to the arrest, to impound respondent's truck while Officer Toporek took respondent into custody (Pet. App. 28). At the time, the truck was parked in a no-parking area of a highway (*id.* at 27; J.A. 8-9). Prior to the arrival of a tow truck to take respondent's vehicle to the impoundment lot, Officer Reichenback conducted an inventory of the truck's interior according to standard local police department procedures (Pet. App. 28 & n.2). In the course of that procedure, Officer Reichenback inventoried the contents of a closed backpack that he found directly behind the front seat of the truck (*id.* at 28-29). Inside the backpack, he found a nylon bag that contained three tin cans and a coffee can (*id.* at 29). Opening each of the cans, the officer discovered that they contained cocaine, cocaine paraphernalia, several tablets in a zip-lock bag, and $700 in cash (*ibid.*). The local police subsequently determined that the tablets contained methaqualone (Complaint 1).

2. Following the suppression hearing, the trial court found that the two officers had made the decisions to impound the vehicle and to inventory its contents according to standard police procedures and in good faith (J.A. 80, 86). The court also found that "the search of the backpack was done for the

purpose of protecting [respondent's] property, protection of the police from subsequent claims of loss or stolen property, and the protection of the police from dangerous instrumentalities. It was not a pretext for an investigative search." *Id.* at 82; see also *id.* at 86. The court held that standard police department procedures did not require the officers to ask respondent whether he preferred to have his truck parked and locked rather than impounded.[1] The court also found that an inventory of an impounded motor vehicle pursuant to standard procedures included "the opening of containers and the listing of contents" (*id.* at 80, 81). Based on those findings and its reading of this Court's decision in *Illinois* v. *Lafayette*, 462 U.S. 640 (1983), the court concluded that the inventory search did not violate the Fourth Amendment (Pet. App. 83). The court nonetheless granted respondent's motion to dismiss, ruling that the inventory search violated the Colorado Constitution, as construed by the Colorado Supreme Court in a 1976 decision, *People* v. *Counterman*, 192 Colo. 152, 556 P.2d 481 (Pet. App. 83-87).

3. On the State's interlocutory appeal, the Colorado Supreme Court affirmed. Unlike the trial court, however, the Colorado Supreme Court based its ruling on the Fourth Amendment and not on the state constitution (Pet. App. 26-51). Citing this Court's decisions in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), the court concluded "that an individual possesses a reasonable expectation of privacy in regard to sealed containers" that are found in an automobile.

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[1] Under the local "park and lock" procedures, the police officer simply drives the car to a legal parking place where he removes the ignition key and locks the car. See J.A. 90-94.

That expectation of privacy, the court held, "must be respected during an inventory search" (Pet. App. 35, 37-38). The Colorado Supreme Court rejected the trial court's conclusion that this Court's more recent decision in *Illinois* v. *Lafayette*, *supra*, required a different result (Pet. App. 39-44). According to the state court, *Lafayette* permits inventory searches of closed containers only when the search is incident to the incarceration of the arrested individual and occurs at the stationhouse (Pet. App. 40-41).

To determine the reasonableness of the inventory search of respondent's knapsack and the containers located inside it, the state supreme court weighed the governmental interests advanced by the inventory in this case against the intrusiveness of the search (Pet. App. 44-48). The court concluded that the inventory of the knapsack and the containers was unreasonable and, accordingly, violated the Fourth Amendment. In reaching that conclusion, the court stressed several factors, including (1) that the impound lot was enclosed and was routinely patrolled by the police (Pet. App. 44-45); (2) that respondent was available and could have been asked if he would have preferred an alternative disposition of the truck and its contents (*id.* at 45-47); and (3) that the containers were apparently meant to hold personal items and provided "little indication" that they contained valuables or dangerous materials (*id.* at 47-48). Although the court found that the inventory search was unreasonable, it did not question the trial court's finding that the police officer had performed the inventory search according to standard procedures and in good faith (*id.* at 50).

Two justices dissented, contending that the case was controlled by this Court's decision in *Lafayette*. The

dissenters distinguished *Chadwick* and *Sanders* on the grounds that neither involved an inventory search and that both involved warrantless searches of luggage found in the trunk of an automobile (Pet. App. 58-76). They also pointed out that *Lafayette* specifically rejected the balancing analysis employed by the majority, which focused on case-specific factors such as the type of container searched and the availability of less intrusive alternatives (Pet. App. at 61-66).

SUMMARY OF ARGUMENT

The decision of the Colorado Supreme Court fundamentally misconceives the nature of inventory searches. As this Court explained in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), inventory searches are a necessary by-product of the caretaking responsibility of law enforcement officials for those items of personal property that come into their possession in the course of the regular performance of their duties. Whether they occur in a criminal or non-criminal setting, inventory searches are reasonable because they address three distinct non-investigative concerns: (1) protection of the police against false claims of theft; (2) protection of the owner of the property from theft; and (3) protection of the police from potential dangers posed by property in police custody.

The court below erroneously concluded that these concerns did not justify an inventory of the containers in respondent's lawfully impounded truck. In reaching that conclusion, the court ignored the special nature of inventory searches and subjected the inventory procedure to the kind of constitutional scrutiny that is more typically reserved for investigative searches. Weighing the degree of the intrusion in

this case against the need for an inventory search in the particular circumstances in which the truck was seized, the court found that the search in this case was not supported by "compelling governmental interests." The court therefore held that the search violated the Fourth Amendment.

Such particularized and heightened judicial scrutiny has no place in the inventory search context. Contrary to the decision of the court below, the demands of the administrative caretaking function do not lose their force when applied to an inventory search of closed containers discovered by law enforcement officers in a lawfully impounded motor vehicle. Neither the reasonableness of an individual's expectations of privacy in a particular container nor the availability of less intrusive alternatives affects the validity of an inventory search. As long as the inventory search extends only to those containers that may contain valuables or dangerous instrumentalities, and as long as it is performed according to standard inventory procedures, the search of the containers satisfies the Fourth Amendment.

The rationale underlying this Court's decisions on the subject makes it clear that inventory searches may lawfully extend to the contents of closed containers found in a motor vehicle. In *South Dakota* v. *Opperman*, *supra*, the Court upheld an inventory search of the contents of the interior of a motor vehicle lawfully impounded by police, including a search of the glove compartment, which "is a customary place * * * for the temporary storage of valuables" (428 U.S. at 372). Although *Opperman* did not involve an inventory search of the contents of a separate container discovered in the vehicle, this Court left little doubt that such a search would be valid.

Treating the motor vehicle itself as a container, the Court upheld the right of police to inventory its contents and to remove loose personal property for storage at the police station. The Court did not require that the police simply seal the vehicle as a unit or follow "park and lock" procedures instead of impoundment.

The Court's more recent decision in *Illinois* v. *Lafayette*, 462 U.S. 640 (1983), dispels any possible remaining doubt that an inventory search may extend to containers. In *Lafayette*, the Court upheld an inventory search of a shoulder bag in the possession of an individual being taken into police custody. The Court in *Lafayette* rejected suggestions that the Fourth Amendment imposes limitations on inventory searches of the sort that the court below imposed in this case. In particular, the Court rejected contentions that the police must pursue less intrusive alternatives or that the reasonableness of a search of a particular container turns on the arrested individual's expectations of privacy in the container. Although the inventory search in *Lafayette* was performed at the stationhouse just prior to the defendant's incarceration, the different setting for the search does not require a different analysis of the lawfulness of the inventory procedure. Whether a container is first taken into police custody at the stationhouse incident to the incarceration of an individual or during the impoundment of a motor vehicle following the driver's arrest, the policies justifying an inventory search are the same. It is the fact that personal property of another is in police custody that triggers the caretaking responsibilities of law enforcement officials. In *Lafayette* and in this case, the police caretaking responsibilities were virtually identical, because in each case the individual's property was to

be retained by the police for safekeeping while the individual was in police custody. The permissible scope of the inventory search should therefore be the same in both settings.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT BAR AN INVENTORY SEARCH OF CONTAINERS FOUND IN A LAWFULLY IMPOUNDED MOTOR VEHICLE

This case concerns the permissible scope of routine inventory searches of personal property. The Colorado Supreme Court held that such searches may not extend to the contents of containers discovered by police officers in the course of inventorying a lawfully impounded motor vehicle. We disagree. It is our submission that the state court ignored the valid administrative function of inventory searches and erroneously applied a heightened level of Fourth Amendment scrutiny that is applicable only to investigative searches. The legitimate concerns that justify inventory searches apply to the inventorying of all kinds of containers that come into police custody through lawful means; there is no reason to apply a different rule based on the mere happenstance that the containers were, as in this case, first discovered in a lawfully impounded motor vehicle. That principle is borne out by this Court's decisions on the subject of inventory searches, and there is nothing about the circumstances of this case that takes it outside the reach of those decisions.

1. In *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), this Court held that the police may conduct a routine inventory of the contents of an automobile that has been lawfully impounded, and that the police may remove certain of the inventoried items for safe-

keeping. The Court observed that the routine administrative practice of securing and inventorying property taken into police custody incident to the performance of law enforcement responsibilities developed in response to three distinct needs: (1) the protection of the owner's property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property; and (3) the protection of the police from potential danger. *Id.* at 369. See also *Cady* v. *Dombrowski*, 413 U.S. 433, 446-447 (1973); *Harris* v. *United States*, 390 U.S. 234, 235-236 (1968); *Cooper* v. *California*, 386 U.S. 58, 61-62 (1967).

Although Fourth Amendment concerns clearly are implicated by the practice of inventorying the contents of an automobile (*Opperman*, 428 U.S. at 377 n.1 (Powell, J., concurring)), the reasonableness of the practice does not depend on the existence of probable cause or a formal warrant. "The standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures" and the policies underlying the warrant requirement do not come into play in the non-investigative context of an inventory search. *Opperman*, 428 U.S. at 370 n.5. In the case of an inventory search, the officer "does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate." *Id.* at 383 (Powell, J., concurring).

In *Opperman*, the Court upheld the inventory search of the glove compartment of a seized vehicle

"since it is a customary place for documents of ownership and registration * * * as well as a place for the temporary storage of valuables" (*id.* at 372). The Court stressed that standard inventory searches included the examination of glove compartments and that there was "no suggestion whatever that this standard procedure * * * was a pretext concealing an investigatory police motive" (*id.* at 372, 376 (footnote omitted)).

Opperman did not directly address the precise issue presented in this case: whether the scope of an inventory search may extend to the opening of closed but unsecured containers located in the interior of a lawfully impounded vehicle. The decision nonetheless strongly supports the validity of such an inventory search. *Opperman* responded to the legitimate noninvestigative needs of law enforcement officers to inventory personal property that is taken into police custody for safekeeping. In particular, this Court recognized in *Opperman* that " 'when the police take custody of *any sort of container* [such as] an automobile * * * it is reasonable to search the container to itemize the property to be held by the police.' " 428 U.S. at 371, quoting *United States* v. *Gravitt*, 484 F.2d 375, 378 (5th Cir. 1973), cert. denied, 414 U.S. 1135 (1974) (emphasis added; brackets in original). The Court, moreover, rejected any notion that the Fourth Amendment required that rather than conducting an inventory, the police must instead either seal the automobile as a unit or use "park and lock" procedures. See *Opperman*, 428 U.S. at 379 (Powell, J., concurring).

The court below, ignoring the basis of the Court's reasoning in *Opperman*, concluded that a valid inventory search of a lawfully impounded motor vehicle

could not extend to the contents of containers discovered by law enforcement officers inside the vehicle. Finding that the inventory search was not supported by "compelling governmental interests," and balancing "the [respondent's] privacy interests in the [containers against] the government's need to inventory their contents," the court held that the search violated the Fourth Amendment (Pet. App. 43, 49).

Such particularized and heightened judicial scrutiny has no place in the inventory context. Inventory searches, this Court has held, are justified by the overall reasonableness of routine inventory procedures. As *Opperman* firmly established, neither the reasonableness of an individual's expectations of privacy in a particular container nor the availability of less intrusive alternatives in a particular case affects the validity of a routine inventory search. Hence, just as it was reasonable for the police to inventory the contents of the lawfully seized container (an automobile) in *Opperman*, it is reasonable for the police to inventory the contents of any containers subsequently discovered by officers inside that larger container.[2] The fact that the police may discover a container inside another container in the course of a

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[2] Notably, the Court in *Opperman* cited with approval a number of lower court decisions upholding searches of the contents of containers found during automobile inventories. See *United States* v. *Mitchell*, 458 F.2d 960 (9th Cir. 1972) (sample case); *United States* v. *Lipscomb*, 435 F.2d 975 (5th Cir. 1970), cert. denied, 401 U.S. 980 (1971) (suitcase); *Lowe* v. *Hopper*, 400 F. Supp. 970 (S.D. Ga. 1975) (sealed envelope in plastic pouch); *State* v. *Tully*, 166 Conn. 126, 348 A.2d 603 (1974) (paper bag and knapsack); *People* v. *Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S. 2d 945 (1971) (briefcase); *State* v. *Montague*, 73 Wash. 2d 381, 438 P.2d 571 (1968) (paper bag).

lawful inventory search does not diminish the continuing non-investigative needs of law enforcement officials to inventory the contents of the newly-discovered container. Under *Opperman*, as long as the inventory search extends only to those containers that may contain valuables or dangerous instrumentalities, and as long as the inventory search is performed according to standard inventory procedures, the search of a container and the seizure of its contents comports with the Fourth Amendment command of reasonableness.

2. This Court's more recent decision in *Illinois* v. *Lafayette*, 462 U.S. 640 (1983), dispels any remaining doubt concerning the validity of inventorying the contents of containers found in a lawfully impounded motor vehicle. In *Lafayette*, the Court upheld an inventory search of a shoulder bag in the possession of an individual being taken into police custody, even though the individual clearly had substantial expectations of privacy in the bag and its contents. See *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 11. In upholding the inventory procedure, the Court specifically rejected the very limitations that the state court sought to place on the inventory search in this case.

a. First, the Court in *Lafayette* squarely rejected the state court's contention (Pet. App. 34-39) that *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), impose warrant and probable case requirements on inventory searches of containers. See 462 U.S. at 643-644. Both *Chadwick* and *Sanders* concerned investigative searches of closed containers taken from automobiles; they did not involve "incidental administrative step[s]" such as routine non-investigative inven-

tory searches (*id.* at 644). See *United States* v. *Laing*, 708 F.2d 1568, 1571 (11th Cir.), cert. denied, 464 U.S. 896 (1983). In *Chadwick*, moreover, the majority stressed that the case had no bearing on the availability of "other justifications for a warrantless search of luggage taken from a suspect at the time of his arrest" (433 U.S. at 15 n.9). With specific reference to inventory searches, the Court stated that "the salutary functions of a warrant simply have no application in [the inventory search] context; the constitutional reasonableness of inventory searches must be determined on other bases." *Id.* at 10 n.5. The dissenters in *Chadwick* likewise noted the continued viability of the inventory exception (*id.* at 21).

The *Lafayette* decision also rejected the state court's suggestion (Pet. App. 44-47) that the validity of a particular inventory search turns on a weighing of the need to search the particular container against the strength of the individual's privacy interests in that container. In particular, the Court in *Lafayette* rejected the argument that because of the arrestee's expectations of privacy in the shoulder bag, the police should have employed the "less intrusive alternative" of inventorying the shoulder bag as a unit rather than examining its contents (462 U.S. at 647). "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," the Court explained. "The real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps; it is not our function to write a manual on administering routine, neutral procedures of the station house." *Ibid.* (emphasis in original); see also *United States* v. *Martinez-*

Fuerte, 428 U.S. 543, 557 n.12 (1976); *Cady* v. *Dombrowski*, 413 U.S. at 447 (1973). The Court added that "it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be * * * sealed as a unit." 462 U.S. at 648; see also *United States* v. *Ross*, 456 U.S. 798, 821 (1982); *New York* v. *Belton*, 453 U.S. 454, 458 (1981). That analysis, as Professor LaFave has suggested, applies equally to inventory searches of containers taken from arrestees and containers found in their vehicles. W. LaFave, *Search and Seizure* § 7.4, at 274 (Supp. 1986) (footnotes omitted) ("[A] unanimous Supreme Court in *Illinois* v. *Lafayette* rejected the notion that * * * a container carried by an arrestee should be sealed rather than searched. Doubtless the Court would reach precisely the same conclusion as to containers within inventoried vehicles.").

Finally, the Court in *Lafayette* specifically rejected the suggestions made by the state court here (see Pet. App. 47-48) that the police officer should have considered the "personal" nature of the containers found in respondent's truck, and that an inventory search can extend only to containers that affirmatively indicate that they contain a valid object of an inventory search. In rejecting those contentions, the *Lafayette* Court explained that "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns." (462 U.S. at 646). On that issue, the Court restated a point made by Justice Powell in his concurring opinion in *Opperman*, that in conducting an inventory, unlike an investigative search, an officer

"does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules" (428 U.S. at 383).

Hence, contrary to the views of the court below, the Fourth Amendment standard of reasonableness requires only that the inventory search be conducted according to standard inventory procedures and that those procedures provide for inventorying the contents of containers that might, on a categorical basis, contain the legitimate objects of an inventory search.[3] The permissibility of a routine inventory search does not turn on whether the facts of a particular case support one or more of the justifications underlying the adoption of an inventory procedure—indeed, the practice would not be "routine" if it did. Cf. *United States* v. *Robinson*, 414 U.S. 218, 235-236 (1973).[4]

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[3] Of course, the degree of scrutiny in an inventory search should, in all events, be no more than necessary to produce an itemized list; it should not, for example, involve examining the contents of "materials such as letters or checkbooks that 'touch upon intimate areas of an individual's personal affairs' * * *." *Opperman*, 428 U.S. 380 n.7 (Powell, J., concurring), quoting *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). There is no suggestion in this case that the degree of scrutiny, once the officer opened the containers, was excessive.

[4] The facts of this case underscore the flaw in the state court's attempt to judge the reasonableness of the search based on the court's assessment of the presence (or absence) of affirmative signs that the particular containers at issue were likely to hold valuables or weapons. Although the court found insufficient indications to justify the inventory (Pet. App. 48), the record shows that the police discovered $700 in cash in one of the containers. See *id.* at 29.

b. The state court (Pet. App. 39-44), and now respondent (Br. in Opp. 4),[5] contend that *Lafayette* bears little on this case, because the inventory search in *Lafayette* was performed at the stationhouse incident to incarceration while the search in this case occurred outside the stationhouse incident to the impoundment of a motor vehicle. That distinction does not support a difference in result. Whether property is first taken into police custody at the stationhouse prior to incarceration or in the course of the impoundment of a motor vehicle, the governmental interests justifying an inventory procedure are virtually identical.

In both *Lafayette* and in this case the police were potentially responsible for the property they took into their custody, and in both cases the police stored the property on police premises for safekeeping.[6] Consequently, in both cases the inventory procedure was justified by the three concerns that support inventory searches generally: protection of the property, protection of the police from danger, and protection of the police from false claims of loss. In both cases, the property in police custody could presumably be

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[5] We note that in the trial court respondent practically admitted that *Lafayette* controlled the outcome of this case as a matter of federal constitutional law and relied instead on the Colorado Constitution. See Tr. 148, 161 ("I understand that based on [*Lafayette*], our federal argument is—has been basically emasculated. * * * I think it will be a cold day in August in Colorado before the * * * Colorado Supreme Court allows that to happen in this state."). Respondent did not file a brief with the Colorado Supreme Court, and that court did not hear oral argument on the case.

[6] Pursuant to standard police department procedures, the containers inventoried in this case were to "be removed from the vehicle and subsequently placed into Property for safekeeping" (see J.A. 90).

rendered reasonably secure from outside interference. Nonetheless, the police are not required to "post[] a guard" over the property while it is in their custody, as an alternative to inventorying and securing each item. See *Lafayette*, 462 U.S. at 648; *Cady* v. *Dombrowski*, 413 U.S. at 447. In addition, the dangers posed by property of unknown character are much the same in either case, particularly at the time the property is returned to the arrestee upon his release. See *Lafayette*, 462 U.S. at 646. And in either case, the police are subject to being falsely charged with theft of the property taken from the arrestee. For those reasons, the fact that the police initially inventoried the containers in different locations in the two cases should be irrelevant to the permissible scope of the inventory search. Just as inventorying the contents of the shoulder bag was reasonable in *Lafayette*, it was equally reasonable for the police to inventory the contents of the containers in this case.[7]

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[7] Not surprisingly, the Colorado Supreme Court stands almost alone in failing to read *Lafayette* and *Opperman* as establishing the validity of inventorying the contents of containers found during an inventory search of a lawfully impounded motor vehicle. See, *e.g.*, *United States* v. *Trullo*, No. 85-1708 (1st Cir. May 14, 1986) (false Pennzoil can); *United States* v. *Griffin*, 729 F.2d 475 (7th Cir.), cert. denied, No. 83-2027 (Oct. 1, 1984) (bag; storage box); *Henderson* v. *State*, 699 S.W.2d 419, 420-421 (Ark. Ct. App. 1985) (briefcase); *State* v. *Gasparro*, 480 A.2d 509, 516 (Conn. 1984), cert. denied, No. 84-2029 (Oct. 7, 1985) (briefcase); *State* v. *Slaybaugh*, 108 Idaho 551, 552-554, 700 P.2d 954, 955-957 (Ct. App. 1985) (purse); *Ciriago* v. *State*, 57 Md. App. 563, 567-572, 471 A.2d 320, 321-324, cert. denied, 300 Md. 152, 476 A.2d 721 (1984) (suitcases); *State* v. *Ferguson*, 678 S.W.2d 873, 877 (Mo. Ct. App. 1984) (briefcase); *People* v. *Gonzalez*, 62 N.Y.2d 386, 389-391, 465 N.E.2d 823, 824-825 (1984) (paper bag); *State* v. *Muralt*, 376 N.W.2d 25 (N.D. 1985) (canvas

3. Respondent contends that the inventory search in this case was unlawful because the police officers possessed considerable discretion in deciding whether to inventory respondent's truck (Br. in Opp. 6-8). In particular, respondent points out that when, as here, the driver of a motor vehicle is being arrested for committing a traffic offense, the police have discretion to follow "park and lock" procedures instead of impounding the vehicle (*ibid.*; see J.A. 88-94).

To be sure, the reasonableness of inventory searches depends in part on the absence of "significant discretion * * * in the hands of the individual officer [conducting the search] as to the subject of the search or its scope" (*Opperman*, 428 U.S. at 384 (footnote omitted)). In this case, however, any discretion the police officers may have exercised pertained only to the threshold determination whether to impound respondent's motor vehicle or to follow "park and lock" procedures.[8] There is no suggestion in the record that

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bag); *State* v. *Bronaugh*, 16 Ohio App. 3d 237, 239-242, 475 N.E.2d 171, 174-176 (1984) (suitcase; paper bag); *Wooldridge* v. *State*, 696 S.W.2d 252, 254-255 (Tex. Ct. App. 1985) (8-track case); *Boggs* v. *Commonwealth*, 331 S.E.2d 407, 414-415 (Va. 1985), cert. denied, No. 85-6009 (Feb. 24, 1986) (bag); see also *State* v. *McGuire*, 218 Neb. 511, 515-516, 357 N.W.2d 192, 196 (1984) (luggage); but see *People* v. *Nogel*, 137 Ill. App. 3d 392, 484 N.E.2d 516 (1985). The decisions to the contrary on which the state supreme court relied were all handed down prior to *Lafayette*. See Pet. App. 37-38.

[8] In commenting on the "considerable discretion" provided to the police under the city's vehicle impoundment procedures, the trial court appears to have been referring solely to the decision whether to impound or park and lock the vehicle. See J.A. 80. Notably, although the police directive introduced at trial focuses on impoundment of a motor vehicle incidental to an arrest of an individual or to a traffic accident, the city code provides for impoundment in a variety of circumstances. See

the police, once they made the threshold decision to impound the vehicle, exercised "significant discretion" in the subsequent performance of the inventory search or abused what little discretion they may have possessed. Indeed, all indications in the record are to the contrary.

As a matter of state law, the trial court construed the relevant police department directive (see J.A. 88-94) as requiring "a detailed inventory involving the opening of containers and the listing of contents." The court then specifically found that the police followed those standard procedures in inventorying the contents of respondent's truck, including the containers discovered inside (J.A. 80, 81, 82, 86). The court also found "that the decision to impound the vehicle and the decision to do the type of [inventory] search that was done were both made in good faith * * *" (*id.* at 80). Finally, the court found that the inventory search was performed to protect respondent's property and the police from claims of theft and from dangerous instrumentalities. The inventory procedure, the court found, was not a mere pretext for an investigative search, and it was not "aimed at [respondent] for any reason" (*id.* at 82, 86). The state supreme court neither questioned the lower court's construction of the local police department procedures nor disturbed any of its findings with regard to the officers' conduct of the inventory search. For these reasons, the seizure of the drugs in the course of the inventory search in this case was not in any respect the product of the exercise of impermissible discretion by the police.

City of Boulder Municipal Code § 7-7-2 (1985) (*e.g.*, traffic hazard, defective vehicle, fire, flood, or snow, parking in a handicapped zone).

CONCLUSION

The judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted.

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No. 85-889

In The
Supreme Court of the United States
October Term, 1985

THE STATE OF COLORADO,
Petitioner,
v.
STEVEN LEE BERTINE,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE RESPONDENT BY THE COLORADO CRIMINAL DEFENSE BAR, INC. AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I. STATEMENT OF THE FACTS

A recitation of the pertinent facts has been adequately set forth by the respondent and the ACLU as *amici curiae* and is here adopted.

II. PRELIMINARY STATEMENT

Amici curiae Colorado Criminal Defense Bar, Inc. and National Association for Criminal Defense Lawyers submit this brief because this case presents important issues concerning the permissible scope of inventory searches. The high expectation of privacy a citizen enjoys in his luggage must be weighed against the governmental purposes served by such searches. While this Court has previously addressed certain Fourth Amendment inventory search issues, it has not yet resolved the issue of the reasonableness of an inventory procedure such as that presented here. Moreover, the balancing of interests in which the Court must engage will have a far-reaching effect.

Additionally, *amici* intend to counter what they believe to be mischaracterizations of the holding below and of prior case law pertaining to inventory search by the United States as *amicus curiae*. It would be improvident and unprecedented in the extreme if the *per se* approach advocated by the United States were to be applied to the facts of this case.

III. SUMMARY OF ARGUMENT

Contrary to the assertion of the United States, the Colorado Supreme Court, in its opinion below, does not fashion a *per se* rule that police never may inventory contents of containers found within a motor vehicle. (*See*

Brief of the United States at 1.) The holding of the Colorado Supreme Court was that where the defendant was available to make alternative arrangements for safekeeping of personalty, and secure facilities for storage were also available, a detailed inventory search of the defendant's luggage found within the vehicle was unreasonable under the Fourth Amendment.

The United States dangerously and unjustifiably frames the issue presented in this petition with broad strokes, not supported by the facts or the law. The state court did not hold, and this Court need not decide on this record, whether under *any* circumstances, an inventory search may extend to containers found inside the vehicle.[1] Rather, the issue is one not previously decided by this Court—whether a detailed inventory search of closed luggage found within a vehicle whose owner has been arrested for a traffic offense was unreasonable, when the owner was present to make alternative arrangements, secure storage facilities were available and there were no indications that the contents were at all dangerous.

Although the requirements of probable cause or warrant are not applicable to this routine inventory, the police conduct in this case still is governed by the Fourth Amendment *reasonableness* requirement. It has often been said, but never gainsaid, that the Fourth Amendment prohibits only *unreasonable* searches and seizures.

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[1]This Court consistently has pointed out the error of analyzing Fourth Amendment cases with such broad strokes. For example, in *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967), the Court observed "to say that gambling raids may never be made without a warrant is not to say that gambling raids may never be made."

The reasonableness of each search "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). Whether a search and seizure is unreasonable under the Fourth Amendment "depends on the facts and the circumstances of each case." *Cooper v. California,* 386 U.S. 58, 59 (1967) (citing *Preston v. United States,* 376 U.S. 364 (1965)). The test for reasonableness "cannot be fixed by per se rules; each case must be decided on its own facts." *Coolidge v. New Hampshire,* 403 U.S. 443, 509-510 (1971) (Black, J., concurring and dissenting).

The United States would subvert this well-established and inexorable balancing process in favor of a *per se* rule to be forged out of the facts of this case for all inventory searches. The United States boldly claims that past decisions of this Court have done away with the balancing requirement and have "rejected" consideration of "less intrusive means" in all inventory searches. *See* Brief of the United States at 12-13. This novel approach to judicial activism, if adopted, would turn Fourth Amendment analysis on its head. From the government's coign of vantage, the distinctions among the stationhouse inventory, with its clearly defined set of compelling state interests, the inventory search of an abandoned auto where neither secure storage facilities or the owner were available, and the inventory of personal luggage in the field where both the owner and secure storage facilities were available, are constitutionally insignificant. This the United States urges, if not based on precedent, at least in the interest of expediency. If this were adopted, the result, far from ensuring the reasonableness of governmental intrusions into legitimately personal effects, would establish a *per se* rule of *unreasonableness.*

IV. THE HOLDING OF THIS COURT IN OPPERMAN DOES NOT JUSTIFY THE INVENTORY SEARCH HERE

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court upheld a routine inventory search of an unoccupied vehicle lawfully impounded for parking violations. As in other Fourth Amendment contexts, the reasonableness of the inventory procedure was determined in light of the facts and circumstances of the case before the Court:

> The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. . . . The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. . . . [T]here is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.
>
> On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

428 U.S. at 375-76. *Opperman* did not give blanket approval to all police inventory searches, and, as pointed out by the Colorado Supreme Court in its opinion below, *Opperman* "did not foreclose challenges regarding the per-

missible scope of such searches." *People v. Bertine*, 706 P.2d 411, 414 (Colo. 1985).[2]

The facts at bar differ in several important respects from the *Opperman* facts. Bertine was arrested with his automobile and thus available to indicate what he wanted done to safeguard his property. Unlike *Opperman*, the inventory here was not prompted by any observation of valuables in plain view. In *Opperman*, the impound lot was "the old county highway yard" with "a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence," where theft had been a problem in the past. 428 U.S. at 366, n.1. In the case at bar, the storage lot was "entirely enclosed by a six-foot fence . . . locked and lighted" and routinely patrolled. *Bertine* at 417. Moreover, *Opperman* did not involve the search of any closed containers in the vehicle.

In light of the differences in circumstances, the *Opperman* holding is not controlling here. Rather, the reasonableness of the police conduct in the case at bar must be determined by balancing "the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects." *Opperman* at 378.

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[2]It should be emphasized that what ultimately occurred in *Opperman* may well occur here as well. On remand, the state supreme court once again held the inventory illegal, but this time relied on the search and seizure provisions of the South Dakota state constitution.

The United States in its *amicus curiae* brief at 12-13 incorrectly suggests that *Opperman* establishes a *per se* rule of reasonableness for any routine inventory search. Such a proposition finds no support in *Opperman* itself, where this Court carefully delineated the expectations of privacy with respect to automobiles vis-a-vis the governmental interests in performing an inventory, *Opperman* at 367-369, and tailored its holding to the facts.

In the case at bar, the governmental interest in an inventory is slight when compared to that in *Opperman*, and Bertine's privacy expectations in his closed backpack considerably greater than in an automobile. Compare *Chambers v. Maroney*, 399 U.S. 42 (1970), with *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *U.S. v. Chadwick*, 433 U.S. 1 (1977). The *Opperman* plurality opinion asserted that routine inventory procedures serve three governmental interests: (1) The protection of the owner's property while it remains in police custody, (2) the protection of the police against claims or disputes over lost or stolen property, and (3) the protection of the police from potential danger. *Opperman* at 369. In this case, the owner of the vehicle was present and could have been asked if he wished to make other arrangements for the vehicle or if he was willing to waive his rights against the police department in lieu of search. The first two objectives cited in *Opperman*—protection of the owner's property and protection against claims—would have been adequately, if not better, served by these alternatives. *See, e.g., United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980); *State v. Killcrease*, 379 So.2d 737 (La. 1980); *State v. Mangold*, 414 A.2d 1312 (N.J. 1980); *State v. Goff*, 272 S.E.2d 457 (W. Va. 1980).

In this case the facts that the storage facility was secure and the probable duration of storage short also support the conclusion that the inventory was unnecessary and hence unreasonable. Moreover, because the backpack was zippered shut and there was no danger of any items falling out, the first two governmental purposes would have been better served by inventory of the backpack as a unit. *United States v. Wilson, supra; United States v. Bloomfield,* 594 F.2d 1200 (8th Cir. 1979).

True enough, this Court's decision in *Illinois v. Lafayette,* 462 U.S. 640 (1983), states that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," 462 U.S. at 647. However, this is not to say, as the United States would seem to contend, that the availability of less intrusive means is irrelevant. (See Brief of the United States at 14.) As the Colorado Supreme Court correctly pointed out, the availability of such alternative means indeed lessens the governmental interests in an inventory. *See Bertine* at 417, n.7.

The third governmental interest—protection of the police from potential danger—is relatively slight absent specific circumstances indicating danger. Justice Powell, concurring in *Opperman* noted that the danger associated with impounding unsecured vehicles is rare. *Opperman* at 378.[3] As one court concluded under circumstances analogous but not identical to those at bar:

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[3]One noted authority has criticized the protection of the police justification more strongly: "[I]t is difficult to take this contention seriously—if police are endangered by unsearched cars in their possession, then it would seem that the public is endangered by cars parked on the streets or other public or semi-public places." 2 W. LaFave, *Search and Seizure,* Section 7.4(a) at 565, n.16 (1978). The four dissenters in *Opperman* also disagreed with the protection of the police theory.

> It is simply not reasonable to assume that, given the circumstances in which this knapsack was found, storing it as a unit at the police station, without specific knowledge of its contents, can pose a danger to police.

United States v. Bloomfield, supra, at 1203. Here, the "danger" was all but nonexistent because the car was taken to a private storage lot and not kept in police custody. In any event, since there was no specific indication of danger in the facts at bar, the protection of the police rationale cannot justify the inventory search of the backpack.

The lessened governmental interests in the inventory procedure here simply did not outweigh Bertine's constitutionally protected privacy interest in the contents of his backpack. As discussed in the opinion of the state supreme court below, an individual's legitimate expectations of privacy in personal luggage are greater than in an automobile. *Bertine* at 414-415. *Cf. Arkansas v. Sanders,* 442 U.S. 753 (1979); *United States v. Chadwick,* 433 U.S. 1 (1977). In light of the less intrusive alternatives and the lack of any specific indication of danger, the inventory procedure here was unnecessary and hence unreasonable.[4]

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[4]It also should be noted that the inventory upheld in *Opperman* was conducted strictly in accordance with a regularized set of police regulations. In the case at bar, there was a trial court finding that the officers followed standard procedures. However, since that ruling was for the prosecution and against the defendant, it was not reviewable in an interlocutory appeal. See C.A.R. 4.1(a); *People v. Weeams,* 665 P.2d 619, 623 (Colo. 1983) (defendant not entitled to interlocutory review under C.A.R. 4.1). Thus, although the brief of the United States as *amicus curiae* makes much of the fact that the Colorado Supreme Court did not disturb the trial court's findings that the police officer performed the inventory according to standard procedure and in good faith (see Brief for the United States at 5, 20), under C.A.R. 4.1 and *Weeams,* these rulings were nonreviewable.

V. THE STATE COURT CORRECTLY HELD THAT ILLINOIS v. LAFAYETTE IS INAPPOSITE TO THIS CASE.

The sole issue in *Illinois v. Lafayette*, 462 U.S. 640 (1983), as succinctly put in Chief Justice Burger's prefatory words, was "whether, at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person." *Id.* at 641. *Lafayette* was a *stationhouse* inventory case. *Lafayette* does not control in a field inventory situation where, as here, there is a police search of personal luggage found in a vehicle which is about to be towed away because the owner is under arrest for a traffic offense.

The decision in *Lafayette* was a response to legitimate governmental needs arising in the custodial setting. Indeed, the Court observed that the governmental interests underlying a stationhouse search of an arrested person's possessions, "in some circumstances" may be greater than those supporting a search immediately following arrest. 462 U.S. at 645. To be sure, some of these interests are similar to those attending the inventory search of defendant's vehicle in this case. However, *Lafayette* entailed considerations peculiar only to the stationhouse which are not pertinent to the inventory in the field. The stationhouse search in *Lafayette* was valid because the government had an interest in preventing dangerous instrumentalities from getting into the hands of inmates. This need is fundamental. Indeed, when one considers that the strong government interest increases arithmetically with each inmate simultaneously detained in the care and custody of the police, this need is compelling.

As the state court held, *Lafayette,* while inapplicable to the inventory search of the defendant's luggage in this case, was consistent with Colorado's view giving police wide latitude in conducting searches in jail settings. *Bertine, supra,* at 416, 417.

The United States would have the Court view this case as controlled by *Lafayette* simply because this was an inventory search rather than an investigatory search. Of course, the government does not argue that, where the government interest is not investigatory, the Fourth Amendment has no application.

> It is surely anomalous to say that the individual and his property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Camara v. Municipal Court, 387 U.S. 523, 530 (1967). The mere fact that the intrusion into the privacy of an individual comes under the rubric of inventory is plainly the one common thread in *Opperman, Lafayette* and this case. But this common factor alone does not compel the same result. Consistent with the balancing process to be applied to each set of facts, *see Coolidge v. New Hampshire, supra,* we have in the case at bar factors entering into the equation not present in either *Lafayette* or *Opperman,* and these factors compel a different result. In *Lafayette,* there was the significant government interest, far greater than even those attending a search incident to arrest, in preserving the safety and well-being not only of the arrestee, but others in custody on the premises.

Here, on the other hand, there is an inventory in the field at the locus of a traffic infraction and far removed

from the stationhouse. The personal effect searched was not a car, as in *Opperman,* but luggage, as in *Sanders* and *Chadwick.* The defendant was available. The storage area was secure. The backpack could easily and safely have been left in the car. Thus, in applying the balancing of interests in this case, there simply was no degree or quantity of governmental interest that outweighed the respondent's enduring expectation of privacy in his own luggage. *Cf. Arkansas v. Sanders,* and *United States v. Chadwick, supra.*

The *Lafayette* court took pains to trace the person of the arrestee from the moment of arrest, "along the continuum" of arrest to incarceration. That the decision is limited to the facts is evident from the court's repeated references to the government's interest at the stationhouse. *Lafayette* clearly was not intended to lay down a *per se* rule for all inventory searches. The question of reasonableness of an inventory search under the circumstances now before the Court is to be decided by a balancing of competing interests which are peculiar to this case, and which were not present either in *Lafayette* or *Opperman. See Bell v. Wolfish, supra; Preston v. United States, supra; Cooper v. California, supra; Coolidge v. New Hampshire, supra.* On balance therefore, it must be concluded that the search of the backpack was unreasonable

VI. CONCLUSION

For all of the reasons set forth hereinabove, together with those set forth in respondent's brief and the brief of *amicus curiae* the American Civil Liberties Union, the

judgment of the Colorado Supreme Court in this case should be affirmed.

Dated: August 26, 1986

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF COLORADO,

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether a line police officer can, consistent with the fourth amendment, conduct a thorough search of a "backpack" found in a vehicle simply because the driver has been arrested for violation of local traffic laws.

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Colorado is one of its state affiliates. The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for a litigant or as amicus curiae, in cases requiring the interpretation of federal constitutional provisions related to criminal cases.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization, headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in

providing representation to indigents in civil cases and 586 defender offices engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal services agencies around the nation, as well as assigned counsel plans and private practitioners.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae in support of the respondent.

STATEMENT OF THE CASE

In this case, state prosecutors have forced a two-year delay in a state criminal defendant's trial in order to press arguments regarding a search of the defendant's belongings through the appellate courts. Those arguments have been rejected at all levels of the state court system. The Supreme Court of Colorado has appraised local law enforcement needs, grappled with applicable precedents, and sustained an individual's assertion of federal right.[1] Now state prosecutors ask this Court to substitute its own judgment regarding law enforcement needs in Colorado for that of that state's highest court and to unleash the Colorado police to do precisely

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1 Cf. Delaware v. Van Arsdall, 106 S. Ct. 1431, 1441 (1986)(Stevens, J., dissenting) (pointing out the implications of any attempt by this Court to monitor state court judgments in favor of litigants asserting federal claims).

what the Colorado Supreme Court has forbidden them to do.[2]

The historical facts are reported in the opinion written by the Colorado Supreme Court. Officer Toporek of the Boulder Police Department stopped a truck driven by the respondent, Steven Bertine, and arrested Bertine for driving under the influence.[3] A second officer, Reichenback, arrived at the scene as a "backup" and, on Toporek's request, handled the disposition of the truck. Reichenback was another line police officer like Toporek. He was not employed by the city of Boulder to superintend impounded vehicles; nor did he work for the private company that ultimately took temporary custody of Bertine's truck. Nevertheless, without consulting Mr. Bertine, Reichenback

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2 Any reversal and remand on the federal issue presented here will, of course, be subject to the state supreme court's independent interpretation of state law. Compare South Dakota v. Opperman, 428 U.S. 364 (1976), with State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

conducted an "inventory" of the truck and its contents. His examination of the truck itself was superficial. Reichenback devoted primary attention to a "backpack" tucked behind the seat. He unzipped the main compartment, unzipped a nylon bag he found inside, removed the covers from tins inside the bag, and, finally, discovered the contraband in issue here.

Officer Reichenback testified that he acted pursuant to a local directive authorizing a "detailed inspection and inventory" of vehicles "used in the commission of a crime." The Colorado Supreme Court held, however, that as a matter of local law Reichenback had "a number of alternatives" from which to choose. While he was authorized to behave as he did, he was also free to seal the truck before it was

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3 We do not treat threshold questions regarding the validity of the stop and arrest.

towed or to drive it to the nearest lot and lock it. 706 P.2d at 413 n.2.

Bertine moved to suppress the contraband, the trial court sustained his motion on state law grounds, and the Colorado Supreme Court affirmed on the ground that the search violated the fourth amendment, applicable through the fourteenth. This Court then granted certiorari to review the state supreme court's judgment in advance of trial.

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem presented in this case is best illuminated by making clear what is not involved. This is not a case about vehicle inventories, but rather a case about searches of luggage. Certainly, this is not a case about the validity of police behavior respecting illegally-parked or abandoned vehicles. See South Dakota v. Opperman, supra. Mr. Bertine did not leave his truck in a no-parking zone, allow his allotted time to expire in a metered space, or abandon his truck as a derelict on the streets of Boulder. To the contrary in this instance, Bertine responded to Officer Toporek's command to pull over and was thereafter denied an opportunity to see to the proper disposition of his own vehicle.

Nor does this case concern the arrest of a suspect whose vehicle was lawfully parked. In cases of that kind, the police may search the suspect's person and the area into which

the suspect can reach to conceal or destroy evidence. There is, however, no constitutional justification for any further intrusion into a lawfully-parked vehicle simply because its driver is to be taken into custody. Finally, this case has nothing to do with administrative searches of items in the possession of suspects about to be placed in a jail cell. In cases of that kind, this Court has permitted inventory inspections--at the stationhouse. Illinois v. Lafayette, 462 U.S. 640 (1983).

This case is here only because it is conceded that Bertine's truck could not lawfully be parked where he was arrested. Furthermore, inasmuch as Bertine was placed under custodial arrest, he could not be asked to move his own vehicle to a place where it could be parked lawfully.

The problem here is further defined by the particular way in which Officer Reichenback responded to the circumstances

presented. He had other options, options that would have contemplated a lesser intrusion upon Mr. Bertine's privacy. He chose, however, to pursue the most intrusive course of action imaginable. Then and there, without asking Bertine's permission, without knowing how long Bertine would be detained, without knowing whether the garageman would ultimately impound the vehicle, Reichenback conducted a thorough search of luggage in the truck--down to the small tins he found inside a zippered bag inside the backpack. This is the behavior that the Colorado Supreme Court condemned and which the prosecution seeks to defend here.

Our argument is in three parts. First, we point out that the approval of Officer Reichenback's search of luggage in this case would undercut this Court's recent decisions regarding the treatment of vehicles and their contents in the field. Fourth amendment limitations fixed for searches incident to

arrest and ordinary searches on probable cause would be superceded, in effect, by a much broader police authority to conduct an inventory. The approval of an inventory of the contents of luggage found within vehicles, moreover, would undermine the Court's many precedents distinguishing automobiles, in which citizens may have a diminished expectation of privacy, and other containers--in which the fourth amendment's protection for privacy is much stronger. In this connection, we discuss the recurring problem of the pretextual use of inventories to circumvent established limits on searches carried out in hopes of finding criminal evidence.

Second, we take up the Court's precedents, particularly Opperman and Lafayette, and demonstrate that this Court has never upheld an inventory search of the kind and scope undertaken here. In this, we recall the Court's familiar practice of

examining particular fourth amendment issues in turn, without attempting to resolve a range of fact-sensitive problems by reference to unitary theories that fail to capture the richness of the circumstances in which the police, and the fourth amendment, must operate.

Third, we offer a doctrinal formulation that strikes a fair balance between legitimate governmental interests in cases of this kind and the individual's constitutional rights under the fourth amendment. The Court should hold that in routine cases the police cannot conduct an inventory without first obtaining permission from the owner and that any such inventories must be conducted by officials with custodial responsibility for impounded vehicles and property rather than by line police officers who may be tempted to use the authority to take an inventory to mask a search for evidence of crime.

I. THE ROUTINE SEARCH OF LUGGAGE FOUND IN A VEHICLE ON THE SOLE GROUND THAT THE DRIVER HAS BEEN ARRESTED IS INCONSISTENT WITH WELL-SETTLED FOURTH AMENDMENT STANDARDS GOVERNING SEARCHES IN GENERAL

If local police were permitted to make thorough searches of luggage found in vehicles under a sweeping authorization to take an "inventory" of their contents, the great body of this Court's recent fourth amendment precedents, painstakingly developed on a case-by-case basis, would be swallowed up by the rising tide of so-called "administrative" process.

A. The Automobile Cases

If Officer Reichenback's conduct were judged against ordinary fourth amendment standards, the judgment below would be affirmed. His meticulous examination of the contents of Bertine's luggage, simply because it was found inside the suspect's truck, far exceeded the bounds of a search incident to arrest. The controlling precedent, New York

v. Belton, 453 U.S. 454 (1981), established that the passenger compartment and containers therein may be searched for weapons and evidence that the suspect might reach and destroy. Belton might, accordingly, allow Reichenback to check the backpack for a gun, but it would hardly validate reaching inside, extricating the zippered bag, opening that smaller container, finding the tins, opening them, and, finally, examining their contents.[4]

Similarly, Reichenback's behavior fell well below standards fixed for ordinary searches for evidence. Bertine was arrested for DWI. If Reichenback had proposed to search for liquor, the scope of the search actually undertaken was, again, far broader than the fourth amendment would allow. United States v. Ross, 456 U.S. 798 (1982). No one could reasonably have believed that liquor would be found in the tins that

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4 So far as we are aware, the prosecution made no attempt to justify Officer Reichenback's behavior under Belton.

Reichenback opened. And, certainly, no one had probable cause to search for evidence of any other offense.

B. The Luggage Cases

More important still, Reichenback's behavior ignored a fundamental distinction hammered out in other "luggage" cases, particularly United States v. Chadwick, 433 U.S. 1 (1977). Reichenback did not merely search Bertine's vehicle. He also carefully searched his luggage. Searches of vehicles may be subject to special fourth amendment rules because of the mobility of cars and the diminished expectation of privacy that citizens have in them, given the pervasive regulation to which they are subject. South Dakota v. Opperman, supra, at 367-69. But in the case of luggage, typically used to transport private materials, neither mobility (in the sense of portability) nor regulation diminishing the ordinary citizen's legitimate

expectation of privacy obtains. Even when luggage is found, by chance, in an automobile, the police must have probable cause and a warrant to search in other than exigent circumstances. This is th clear meaning of United States v. Chadwick. If the inventory in the case at bar stands, Chadwick must effectively go--along with Belton and Ross.

The reach of the inventory authority contended for in this case is not restricted to cases involving vehicles at all. Indeed, if the inventory in this case wins approval, we can expect prosecutors in the next case to claim that the police can inventory the contents of a house--on the theory that it is in their custody while they await a warrant authorizing an ordinary search for specified evidence. Cf. Vale v. Louisiana, 399 U.S. 30 (1970).

C. The Pretext Problem

The blanket authority to conduct

inventories asserted by the prosecution in this case would, if recognized, invite pretextual use in aid of ordinary criminal investigations. Time and again, this Court has insisted that fourth amendment doctrine must be sensitive to the possibility of abuse, and police authority to invade individual privacy for administrative purposes has often been checked because such authority might be used pretextually. The requirement in Opperman and Lafayette, for example, that inventories must be carried out on the basis of standard operating procedures was established to protect against the selective employment of the authority to make an inventory in order to mask searches for evidence in the absence of probable cause.[5]

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5 In a related case before the Court this Term, we argue that the first line of defense against the pretext is the establishment of fourth amendment doctrine groomed to minimize the opportunities for its abuse. Brief of Amici Curiae, American Civil Liberties Union and the Civil Liberties Union of Missouri, Missouri v. Blair, No. 85-303. We also argue in Blair that courts should ask

In this instance, it is hardly sufficient that Officer Reichenback was permitted under a local guideline to behave as he did. First, as the Supreme Court of Colorado made clear, he was also authorized to deal with the situation in at least two other ways--both of which would have been more sensitive to the privacy interests at stake. Thus Reichenback did not simply follow orders, doing what he was required to do according to rigid rules designed to limit discretion in the field. He exercised the very kind of discretion that lends itself to the pretext.

Second, and more fundamentally, even a more rigid rule demanding that field inventories be conducted would have neglected the privacy interests of citizens in Mr.

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not only whether police behavior in a particular case can be justified on some constitutional basis, but whether the police complied with fourth amendment standards governing the purposes for which they actually acted.

Bertine's place. As Justice Rehnquist warned in Delaware v. Prouse, 440 U.S. 648, 664 (1979)(dissenting opinion), the problems associated with administrative inspections are not met by a simplistic, "misery loves company" insistence that everyone's privacy must be sacrificed. Rather, the possibility of pretextual use must be met forthrightly--with doctrine framed to discourage abuse in each kind of case in turn.

The inventory conducted in this case presented special dangers of pretextual use. The ordinance under which Officer Reichenback acted specified a "detailed" inspection and "inventory" if the vehicle in question had been "used in the commission of a criminal offense."[6] That, in turn, is precisely the

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6 Officer Reichenback conceded on the stand that the ordinance could not be read literally--such that every vehicle used in the commission of a crime must be impounded. That, of course, would mean that every car stopped in traffic would be impounded and its contents inventoried. No one suggests that any such practice prevails in Boulder.

kind of case in which the police may be tempted to use the cover of such an inventory to mask a search for evidence of the offense in which the vehicle was involved. Indeed, the circumstances of this case generate the unmistakeable odor of the classic pretext. Boulder is the home of the University of Colorado, whose grounds were visible from the place where Bertine's vehicle was stopped. J.A., p. 43. Mr. Bertine, wearing "long red hair," a beard, and glasses, was driving during "early morning hours" with only his dog for company. J.A., pp. 4-5, 10. Ample parking space was available, also within sight of the scene, and it would have been simple enough to dispose of the truck pending Bertine's return by parking and locking it nearby. J.A., pp. 43, 50. Nonetheless, Officer Reichenback chose this occasion for a thoroughgoing exploration of both the vehicle and Mr. Bertine's backpack. He conceded, moreover, that he devoted primary attention

to the backpack, digging into the zippered bag he found inside and, of course, into the tins inside the bag. The trial judge described the inventory of the rest of the vehicle as "slip shod." J.A., p. 81.

We are not in a position to accuse the officer in this case of searching the backpack on the hunch that his young suspect might be carrying drugs and then explaining his unconstitutional behavior away as an inventory conducted in the field. Yet the circumstances of this case, and others we all might anticipate, underscore the real threat of pretext with which the Court must contend. The approval of what Officer Reichenback did here would amount, we think, to tempting honest police officers toward duplicity.

II. NONE OF THIS COURT'S PRIOR DECISIONS HAS APPROVED THE FIELD INVENTORY PROCEDURE FOLLOWED IN THIS CASE

The prosecutors in this case, and the

Solicitor General as amicus curiae, suggest that Opperman and Lafayette have already decided the question presented here. They argue, essentially, that by approving the inventories conducted in the quite different circumstances of those cases, the Court has already boxed itself in--and cannot manage in this case to disapprove an inventory without departing from its precedents. This is a mistaken position, ignoring both the Court's consistent recognition that a different factual setting often presents a different mix of factors and considerations that rightly go into a determination of fourth amendment doctrine, as well as the very real bases for distinguishing what was said in prior cases from what should and must be said here.

This Court has long-since abandoned the notion that search and seizure law can be a seamless web. The world the fourth amendment must address is far too complex for that.

There are too many confrontations between police officers and citizens, too many variations in the circumstances attending such confrontations. It is far more profitable to identify themes and values at stake in fourth amendment cases, to arrange cases within rough categories for analysis, and then to balance competing state and individual interests in a doctrinal formulation that promises to work with respect to each category in turn. Even then, it is often necessary to examine the facts of particular cases in order to apply doctrine framed at a higher conceptual level.

Chief Justice Burger was clear in Opperman regarding the scope of the Court's inquiry. The question at bar was whether the police had violated the fourth amendment "when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances." 428 U.S. at 365 (emphasis

supplied). The Court balanced the interests involved and came to a judgment which now constitutes a referent for courts handling cases of that kind. In Lafayette, the Court addressed the different mix of fourth amendment considerations in stationhouse inventories. The Chief Justice was again explicit in his opening statement of the issue: "The question presented is whether, at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person." 462 U.S. at 641 (emphasis supplied). The Court thus recognized in Opperman and Lafayette that different contexts beget different arguments, analyses, and results.

Conceding that Opperman had only to do with searches of illegally parked or abandoned vehicles and did not so much as address the validity of luggage searches, the United States nonetheless contends that that

case provides implicit support for the police conduct in issue here. The Court, it is said, treated automobiles as merely a species of container; what was said about one container, argues the Solicitor General, was said about all. This simply is not so. The Court in Opperman was at pains to explain that automobiles are not ordinary containers. They are affected with a diminished expectation of privacy, flowing from their very nature, the manner in which they are used, and the regulatory regimes to which they are subject. Luggage, of course, is quite different--as the Court explained in Chadwick.[7]

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7 We recognize the Court's concern lest police officers be required to make fine distinctions between and among types of containers in order to comply with the fourth amendment. We think, however, that the Boulder police should have little difficulty telling a backpack from a truck. For all that, houses, too, may formalistically be considered only large containers. But we assume the police also can distinguish a split-level from a convertible.

The inventory approved in Opperman was tied tightly to the recognized need to deal with illegally parked or abandoned vehicles, which present a range of health and safety hazards and must occasionally be towed to impoundment lots. In circumstances of that kind, the Court approved routine inventories in service of the interests stated--as part of the caretaking function being performed. The search conducted here, by contrast, reached directly into luggage in which Mr. Bertine retained a full measure of privacy.

It is true that Opperman allowed the police to open a glove compartment, and we acknowledge that citizens may use cavities attached to a vehicle in much the way they routinely use luggage to store valuables. Yet as Justice Powell made clear in Opperman, that case granted the police "no license...to examine all the contents of [impounded] automobiles." Compartments amounting to

parts of a car were subject to search--not luggage that happened to be inside.[8]

Having derived no support from Opperman, the United States shifts to Lafayette and attempts to analogize the search of Mr. Bertine's luggage on the street to the inventory of an arrestee's possessions immediately prior to the suspect's being placed in a jail cell. Now the individual's "substantial" privacy interest in luggage, as opposed to a vehicle, is conceded. Still, the Solicitor General insists that this search was valid--by analogy to "incidental administrative step[s]" routinely taken at the stationhouse before a suspect is

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8 The precise question pretermitted in Opperman, whether luggage found in abandoned vehicles may be subject to inventory, is not presented here. Mr. Bertine abandoned neither his car nor his luggage. The police themselves precipitated the circumstances under which the truck was impounded, by causing Bertine to pull over and by making a warrantless arrest. They plainly were not engaged in the routine disposition of derelict vehicles.

incarcerated. This argument is without foundation.

Put simply, the field search conducted in the case at bar formed no part of ordinary procedures for detaining criminal suspects. What the police were justified in doing with respect to Mr. Bertine's belongings carried by him to the station is one thing; what they could do with respect to luggage left elsewhere is quite another.

In a real sense, the inventory approved in Lafayette resulted in police behavior going only a short distance beyond what was permissible as a search incident to arrest. None of the further doctrines mentioned previously was undercut; nor did the stationhouse inventory in Lafayette present the same opportunity for pretextual use as would be suggested by a rule permitting field searches like the one conducted here. The working assumption in Lafayette was that when the police make a valid warrantless arrest,

the suspect necessarily suffers an enormous intrusion upon personal privacy and that the further imposition contemplated by an inventory of things in his or her possession is minor by comparison. Then, too, the extraordinary interests protected by an inventory at the station auger for approval of such an intrusion in those peculiar circumstances. Those interests are by no means so significant in the case at bar--in which the arresting officers could anticipate that Bertine would be detained only a short while.

First, the Court recognized in Lafayette that suspects admitted to jail may injure themselves with personal items (belts, drugs, knives) if those items are not taken from them before they are placed in a cell. We agree, of course, but the argument carries only the point that the police should be permitted to search the person of arrested persons bound for a cell and to separate them

from ordinary belongings.[9] It says nothing regarding the search of luggage, even at the stationhouse; certainly, this argument has nothing to do with searching luggage in the field.

Second, the Court said in Lafayette that the police may be held responsible for items taken from suspects admitted to jail and thus should be allowed to inventory belongings held for safekeeping while the owner is detained. This consideration has two spurs. It is argued initially that the police may act paternalistically to protect a suspect's belongings from third parties--when the suspect is unable personally to do so. The idea that the police should protect a citizen's goods from thieves and vandals is

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9 The Court in Lafayette carefully avoided the question of "strip" searches. 462 U.S. at 646 n.2. Nor did the Court treat the special problems raised when jailed suspects require access to materials or documents essential to the exercise of rights retained in confinement or to the preparation of a defense.

appealing; we hardly wish to inhibit genuine public service. Yet if the value isolated under this heading is only the individual's interest in his or her possessions, then it seems only reasonable that the police ask the owner whether their assistance (contemplating a search of luggage) is wanted. Said another way, the police should not act on the basis of assumed consent on the part of the individual when the person concerned is available to be asked for explicit consent. Opperman, at 392-93 (Marshall, J., dissenting); cf. New York v. Class, 106 S.Ct. 960, 975 (1986)(White, J., dissenting with Stevens, J.); Chambers v. Maroney, 399 U.S. 42, 64 (1970) (Harlan, J., dissenting).

In the stationhouse situation in Lafayette, it was difficult, perhaps, for the police to ask for instructions from a jail-bound suspect regarding a shoulderbag on his person. In Opperman, moreover, the Court worried that the owner of an abandoned car might not be close at hand to give explicit

consent. In this case, however, and in all routine traffic arrest cases like it, the driver is by hypothesis on the scene and available for consultation regarding the disposition of luggage.

The other spur of the "property interest" consideration has it that an inventory may be needed to encourage the police themselves to deal carefully and honestly with a suspect's possessions and to deter false claims of theft or carelessness made by suspects later. Evidently, the idea is that an item-by-item accounting made at the outset of a detention can at least narrow down the list of suspects within the police department if something turns up missing. Realistically, an inventory is a very rough tool in this context. It neither prevents the first officer from omitting some items from the inventory, nor prevents suspects from claiming later that that is what happened.

Once again, in the stationhouse situation in Lafayette, the suggestion of an inventory to protect against police misconduct or false claims may have made some sense. The suspect is typically present to watch officers go through his or her things and thus can monitor the procedure being followed. Mr. Bertine was not so fortunate. He was in Officer Toporek's squad car headed for the station when Officer Reichenback searched the belongings Bertine was forced to leave behind. The inventory Reichenback prepared bore only the most remote relationship to discouraging either police thefts or false charges of theft.

Third, the Court recognized in Lafayette that an inventory at the stationhouse may be needed to identify a suspect about to be incarcerated. There will be cases, of course, when recalcitrant criminal suspects refuse to cooperate by giving their names, or when suspects are unable to speak for themselves and their identity can be

determined only by looking at operators' permits and the like. It is, of course, extraordinarily important tnat the police know who it is they are about to put in a jail cell--to take account of physical or mental disabilities that may present special risks, to facilitate the notification of relatives or friends, and simply to develop accurate records of this most dramatic deprivation of liberty.

In Lafayette, the Court raised this "identification" point in passing--to support the general rule that inventories just prior to incarceration are permissible. Yet the Court hardly held tnat a thorough inventory is justified if the only purpose is to identify a suspect. Certainly in cases like this one, when a vehicle is pulled over by the police, the identification of the driver is the first matter to be resolved. Officer Toporek asked Mr. Bertine for his license and registration immediately upon approaching the

truck. It would be ludicrous to contend that the inventory conducted later by Reichenback was in any way justified to ascertain Bertine's name and address. The United States, to its credit, attempts no such argument.

Finally, the Court said in Lafayette that "dangerous instrumentalities" such as "razor blades, bombs, or weapons" can be concealed in "innocent-looking articles taken from the arrestee's possession." This is where the United States invests its real hopes. If the Court can be persuaded to announce fourth amendment doctrine for cases of this kind that will permit the police to search whenever a bomb "might" be inside luggage with which they come into contact, then this case, and by extension most search and seizure cases, will be resolved in favor of governmental power.

To be effective against bombs, the police would have to search the most "innocent-

looking" luggage--which, of course, would be the most likely receptacles to be chosen by terrorists. Not only shoulderbags in the possession of suspects headed for jail or backpacks found in trucks driven by citizens arrested for DWI, but containers of all kinds, shapes, and sizes would have to be investigated. Cars parked near governmental buildings or, indeed, shopping centers; houses located near defense installations. There is very simply no logical stopping place if it is once posited that the police can search to detect bombs they have no reason to think will actually be found. In any event, DWI arrest cases hardly mark a sensible starting place. We hope the country has not yet come to such a pass.

Vehicle and luggage bombs are rare in this country, thank goodness; certainly there is no rash of them in Boulder, Colorado. Reasonable fourth amendment doctrine must, accordingly, reject the open-ended hyperbole which has it that the police, in Boulder or

anywhere else, must have the authority to conduct routine searches of automobiles and luggage to check for evidence of terrorist attacks. Any such authority would sweep away well-settled principles of constitutional law limiting police intrusions upon privacy and, of course, pave the way for pretext searches in a range of instances.[10] In this connection, we note that the model rules adopted by the Police Foundation's Project on Law Enforcement Policy suggest no realistic need for any such blanket authority to search. The relevant rule, reproduced in Appendix A, explicitly instructs officers not to open containers found in cars in cases such as this one. In Appendix B, we reproduce the rule guiding police officers in Boston. That rule directs the police to do precisely what we suggest is constitutionally required--simply to ask the person arrested

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10 Cases in which the police have evidence that a bomb is hidden in luggage present a quite different question.

what he or she would like done with personal property.

This Court had no part of any such argument in Lafayette, where bombs were mentioned only in the context of stationhouse bailments during which a jailed suspect's belongings would be kept inside a public building, near officers and private citizens who frequent such buildings. Even at that, the more serious concern lay with "weapons" that might endanger anyone handling luggage without knowledge of its contents. When a decision has been made to incarcerate a suspect for some period of time, and it is known, accordingly, that the suspect's belongings will be in police custody in the interim, it may be reasonable to hold that an inventory check for weapons is permissible. That is all that was held in Lafayette.

In this case, and in cases like it, however, no special concerns regarding weapons arise. To be sure, the officers here

were briefly in the vicinity of Mr. Bertine's backpack, but it is disingenuous to suggest that they needed to search it to protect themselves from weapons. They were entitled to conduct a search incident to arrest primarily for their own protection; once they exhausted the scope of that search, their authority to make an on-the-scene search for self-protection was spent.[11]

It is also true that Bertine's truck was towed away and was briefly detained in a private impoundment yard, where it is conceivable (though most unlikely)[12] that

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11 Officer Reichenback himself provided evidence that in the routine case the threat of danger is minimal. He conceded on the stand that he would not have opened the trunk of an ordinary automobile--because the driver could not have reached there to retrieve a weapon. Asked whether an inventory might be conducted for some other purpose, he responded that he simply never searched trunks without a warrant. J.A., p. 45.

12 As opposed to the primitive conditions that obtained at the impoundment lot in Opperman, the lot in this case was secured by a six-foot fence. The gate was locked. In addition, the lot was frequently patrolled. J.A., p. 70.

it was accessible to towing service employees, other officers, or others. Indeed, one can speculate that the truck would have been near and accessible to persons who might be harmed by a weapon even if Officer Reichenback had exercised his authority to have it towed to the public parking lot just up the street. Yet to point out these possibilities is to underscore the scope of the authority to search contended for in this case. If luggage in this truck could be searched before the truck was parked in a local lot, why not luggage in all the vehicles parked there by their owners? Why not luggage in any vehicle parked in any public place? There is nothing to choose between such vehicles and Mr. Bertine's truck; the only argument for a search of the backpack (under this heading) is the mere possibility that it might contain a weapon--a possibility that obtains with respect to any

luggage in any vehicle.[13]

There is only one realistic way out of this dilemma. It is the route the Court has taken many times in the past. The mere possibility that a weapon may be hidden in a place regarding which a citizen enjoys a legitimate expectation of privacy is insufficient in itself to justify a search. When, however, there is evidence that a weapon is there and poses a danger to the police or the public, a different rule may be

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13 The Solicitor General attempts to bootstrap the search in this case by pointing out that the "containers" taken from Mr. Bertine's vehicle were to be "placed into Property for safe-keeping."

So, of course, was the footlocker in Chadwick. In this case, moreover, Bertine was released on bond within hours after his arrest--making the duration of any such "safekeeping" minimal at best. The typical arrest for a traffic offense would, of course, contemplate no more lengthy detention than occurred here--in a case in which evidence of other crimes was found before the suspect posted bond and was released. In the routine case, officers at the scene know full well that any impoundment will last a very short time.

appropriate. Chadwick, 433 U.S. at 15 n. 9; Cady v. Dombrowski, 413 U.S. 753 (1973).

III. A SIMPLE DOCTRINAL FORMULATION IS AVAILABLE TO STRIKE THE BALANCE BETWEEN GENUINE STATE INTERESTS AND CONSTITUTIONALLY PROTECTED PRIVACY INTERESTS IN CASES OF THIS KIND

This case calls for hard-minded decision-making about real situations that repeat themselves routinely in daily life. The Court cannot blind itself to the implications of the inventory conducted here--to tne signal that a reversal of the Colorado Supreme Court's decision would send to police departments across the country. If settled doctrine regarding the limits of police authority under the fourth amendment is not to be jettisoned sub silentio, and if the police are not to be tempted into the pretextual use of an authority to conduct inventories, the Court must write an opinion that pays more than lip service to the

genuine privacy interests at stake. Definite lines can and must be drawn for cases of this kind--lines that hold the police to standards that do not, on the precedents, control in other situations. An opinion drawing such lines is plainly feasible; we have offered bases on which both Opperman and Lafayette can be distinguished.

Once again, it is well to be clear on the kind of case that is presented here. The luggage in this case was searched, by hypothesis, only because it was in a vehicle the police had stopped and because the driver was unable, because of his arrest, to see to its disposition personally. The Court need say nothing here about separating a criminal suspect from his or her possessions before incarceration or what the police might do in cases in which the identity of an individual is not readily determined in the routine fashion.

The only question is the disposition of luggage at the scene. The simplest answer is that the police should do what the driver would do if he or she were able to make arrangements personally. In the routine case, that would be to move the vehicle to the nearest lawful parking place and there to park and lock it. The fourth amendment does not insist that police officers drive private vehicles themselves. Officers might reasonably hesitate to risk mechanical failure or accident along the way, and, in any event, the operation of a vehicle might contemplate yet another intrusion upon the owner's privacy. If, however, a vehicle can be routinely towed to a police impoundment yard (or to a private yard designated to receive vehicles impounded by the police), it can just as easily be towed to an ordinary parking lot. Then, the owner can either retrieve the vehicle and the luggage upon his or her release, or arrange for family or

friends to do so. There is nothing elaborate in this. This is the way that countless cases are handled every day--without engaging all the time, expense, and constitutional difficulties associated with impoundment.

There may be instances in which the owner would prefer the added protection for luggage attending impoundment by the police. When, for example, the contents are particularly valuable, the owner may be prepared to accept the intrusion upon privacy associated with an inventory in order to ensure that luggage is not exposed to ordinary theft in a parking lot. The critical fact, in cases of the kind considered here, is that the owner of such luggage is necessarily available to be consulted.[14] The Court should insist that officers simply ask suspects to be taken into custody in these circumstances what they

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14 We do not speak to the "standing" difficulties that might be presented in cases in which someone other than the driver has a privacy interest in luggage.

want done with their luggage. Such a rule protects the suspect's property, and addresses the various related interests discussed above, far better than the approval of a blanket authority to conduct a thorough search without regard for the individual's wishes. If the individual declines to authorize the impoundment of luggage and, instead, asks the police to have the vehicle containing it towed to a parking lot, such a request should be respected.

Special circumstances will arise occasionally, and in some narrowly-defined cases we anticipate that the Court may reasonably establish exceptions to the general rule we advance. In the extremely rare instance, for example, in which there is reason to believe that luggage contains a bomb or weapon, an emergency authority to conduct a reasonably-defined search may be recognized.

Even in exceptional cases, however, line officers in the field should not be authorized to conduct inventories themselves. Any such authority would resurrect the temptation to use the inventory as a pretext. Instead, other public employees, charged not with the investigation of crime but only with the administrative disposition of vehicles, luggage, and the like, should be assigned the exclusive task of making inventories for their independent purposes. Such a separation of functions will not guarantee the elimination of pretext searches, but it promises to reduce their incidence in a relatively painless manner.

In the run of cases, the police will be able to follow the rule we suggest without difficulty. Refinements, of course, should await concrete cases in which competing interests can be identified and resolved against a definite factual backdrop. In the end, routine cases of this kind call only for

common sense--not the bad law that harder cases promise to make.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Colorado Supreme Court. The opinion should explain that the inventory search conducted by Officer Reichenback violated the fourth amendment inasmuch as it was undertaken without consultation with and approval by Mr. Bertine.

Respectfully submitted,

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APPENDIX A*

Rule 603. Prisoner's Property.

A. Definition. When a person is arrested in or around a vehicle which he owns or has been authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as prisoner's property.

B. Disposition of Prisoner's Property. A prisoner shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner. In any case

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* Model Rules for Law Enforcement: Searches, Seizures and Inventories of Motor Vehicles, Approved Draft, April, 1974, p. 63 (emphasis supplied).

where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to make his request in writing.

If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

C. Initial Procedure with Respect to Prisoner's Property. If a vehicle classified as prisoner's property is not taken into police custody, it shall not be inventoried. If it is necessary to take a prisoner's property vehicle into police custody, the vehicle should be taken to a police facility or a location in front of or near a police facility. Immediately upon arrival at a police facility, if the vehicle is not locked, the arresting officer shall remove from

the passsenger compartment all containers--such as boxes or suitcases--and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of $25. After removing any such property, the officer shall, if possible, roll up the windows and lock the doors and trunk. Any property so removed shall be brought into the police facility and appropriate entries and returns made. Containers shall not be opened [at this time]; however, they may be sealed to insure the security of their contents. No other inventory or search of the vehicle shall be made at this time.

[D. Procedure After 24 Hours. If, within 24 hours of the time that the prisoner was arrested, a person authorized by the prisoner (or the

prisoner himself, if released) does not claim a vehicle which was classified as prisoner's property and taken to a police facility, a complete inventory of its contents shall be made under Rule 607.]

APPENDIX B**

407. Vehicle Inventories

Whenever you are securing a vehicle on the street (for example a vehicle involved in an accident or one which a person you arrested was driving) and you discover valuable personal property in it, you should ask the person who owns the property what he wants done with it. If the person who owns the property is not available, you should remove it from the vehicle and turn it over to the duty supervisor when filling out your report on the incident. In this case, you should leave written notification in

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** Boston Police Criminal Investigative Procedures: Search Warrants, Motor Vehicle Searches and Searches Incident to Arrest, February, 1978, p. 110 (emphasis supplied).

the vehicle describing what property was removed and where and when it may be claimed.